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No. 86-

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

SOUTHERN METHODIST UNIVERSITY,
Petitioner,
v.

CAROLE KNEELAND, BELO BROADCASTING CORPORATION,
A. H. BELO CORPORATION, DAVID EDEN, TIMES HERALD
PRINTING COMPANY, NATIONAL COLLEGIATE ATHLETIC
ASSOCIATION AND SOUTHWEST ATHLETIC CONFERENCE,
Respondents.

**PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

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QUESTION PRESENTED FOR REVIEW

The basic question is whether the Court of Appeals, in affirming a District Court decision, failed to follow previous decisions of this Court and other Courts of Appeal, and continued a conflict between the circuits as to circumstances when intervention should be allowed. The Court of Appeals required the petitioner to show "adversity of interest" because it sought the same ultimate result as existing parties, and refused to require the District Court to hold an evidentiary hearing.

The terms and circumstances under which failure to allow intervention occurred are that reporters of the respondent newspapers made demands under the Texas Open Records Act ("TORA") for documents from the National Collegiate Athletic Association ("NCAA"), the Southwest Athletic Conference ("SWC"), and Southern Methodist University ("SMU"). Records requested included those which had been provided by SMU to the NCAA and the SWC as part of a confidential investigation of alleged violations of self-imposed regulations. The respondents argued that the TORA applied under the theory that SMU, the NCAA, and the SWC were "governmental bodies." The demands were denied and respondents filed three separate suits to obtain the records. SMU asserts continued ownership of the records which it had provided to the NCAA and the SWC as part of the confidential investigation. SMU alleges that production of these records would violate its property rights, right to privacy, and freedom of association and would be, when considered from the standpoint of an educational institution, contrary to the TORA. The continuing confidentiality of the records relating

to SMU depended upon denial of their production in each of the three cases.

In the state court case in which SMU was named as a defendant, SMU and other private schools were found not to be governmental bodies under the TORA, and the request for records was denied. In the state court case in which SMU was allowed intervention, one of the plaintiffs in the present case non-suited the case after the court refused to deny SMU the right to intervene. In the present case, SMU was denied the right to intervene even though the Fifth Circuit recognized that SMU may have a greater interest in this matter than the existing defendants. Although SMU sought the same end result as the NCAA and the SWC, factual and legal differences existed. Petitioner did not seek to intervene in order to present evidence and argument to benefit the NCAA and the SWC. SMU sought to intervene to protect its property interests in the documents and to protect its constitutional rights and other rights which a disclosure of the documents would violate. The Court of Appeals affirmed the District Court's denial of intervention without a review of the representation the NCAA and the SWC had in fact provided. SMU alleges that this representation, the sufficiency of which was questioned by the District Court in subsequent opinions, was inadequate.

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JURISDICTION

The Judgment of The United States Court Of Appeals For The Fifth Circuit in Cause No. 86-1118 and Cause No.86-1477, which were consolidated on appeal, was entered on January 7, 1987. *Kneeland v. National Collegiate Athletic Ass'n*, 806 F.2d 1285 (5th Cir. 1987), (See Appendix A). An order denying a

rehearing was entered on February 3, 1987. The jurisdiction of this Court is based on 28 U.S.C. 1254(1).

RULE INVOLVED

Federal Rule of Civil Procedure 24(a)(1)

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action:

* * *

(1) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, *unless the applicant's interest is adequately represented by existing parties.*

Fed. R. Civ. P. 24 (emphasis added).

STATEMENT OF THE CASE

The petitioner, SMU, is a private university which is a member of the NCAA and the SWC. Member institutions use these unincorporated associations to conduct concerted activity in the area of intercollegiate athletics. Member institutions agree to self-imposed regulations and to participate in private, confidential investigations, to enforce those regulations. The self-imposed rules expressly provide that information submitted during the private investigations will remain confidential. Violations of the regulations are not contrary to any state or federal law. Confidential, private investigations are the only enforcement mechanisms which exist.

SMU has been the subject of recent NCAA investigations. Pursuant to rules providing for confidentiality, counsel for SMU interviewed coaches, student athletes and their families, and alumni and submitted a detailed response to the NCAA inquiry. The SWC received some of this information for informational purposes and requested SMU to investigate other alleged violations. SMU did so on a confidential basis. Records and information provided by SMU relating to these investigations were therefore in the possession of SMU, the NCAA, and the SWC.

The plaintiffs, Carole Kneeland and David Eden (reporters); Belo Broadcasting Corporation (a television station); and A.H. Belo Corporation, d/b/a The Dallas Morning News, and The Times Herald Printing Company (newspapers), made demands on SMU, the SWC, and the NCAA under the Texas Open Records Act (TORA), Tex. Rev. Civ. Stat. Ann. Art. 6252-17a, for records relating to the confidential private investigations. SMU, the SWC, and the NCAA refused the demands, and the plaintiffs filed three suits in state court. One was filed in Dallas, Texas, against all of the Texas SWC member schools; one in Dallas, Texas, against the SWC; and one in Austin, Texas, against the NCAA and the SWC. The two state court cases filed in Dallas, Texas, are on appeal to a Texas Court of Civil Appeals. The state court case in Austin, Texas, in which SMU sought to intervene, was removed to the District Court below because of a 42 U.S.C. 1983 claim. The decision of the District Court on the merits in this case is now on appeal but has not been presented to the Fifth Circuit Court of Appeals.

In the Dallas state court case in which the Texas SWC member schools, including SMU, were named as defendants, the court held that the private institutions were not "governmental bodies" under the TORA. After SMU intervened in the other Dallas state court case brought against the SWC, the Times Herald Printing Company (one of the plaintiffs herein below), amended the relief it sought to eliminate its request for records in the possession of the SWC relating to SMU and moved to dismiss SMU's intervention. When that motion was denied, the plaintiff nonsuited the case. By nonsuiting the Dallas case where SMU was allowed to intervene and by successfully opposing SMU's intervention in the case which is the basis for this appeal (See Order denying intervention, Appendix A-1, p. 13a), plaintiffs have avoided litigating with the party which the lower court found may have the greatest interest in defending confidentiality.

The present case against the NCAA and the SWC initially sought records relating only to SMU. Later, records relating to other schools were also sought, but the bulk of the records involved relate only to SMU. SMU sought to intervene in this action to protect its property interests in the requested records and to protect its constitutional rights and other rights which would be lost if the documents were produced. Because the NCAA and the SWC are unincorporated associations which are simply the member schools acting together for certain limited purposes, SMU asserted that it was the real party in interest.

The NCAA and the SWC represent all member schools, including numerous state schools which are admittedly governmental bodies subject to the TORA.

The state universities do not have the same interest as the private schools in the "governmental body" issue under the TORA. SMU is not in the same position as other members of the NCAA and the SWC or the associations themselves. Few other schools have been the subject of an investigation of the magnitude of the SMU investigations or have had their confidential records in the custody of the NCAA or the SWC sought by the news media. The NCAA and the SWC are comprised of rival athletic interests, many of which will benefit from the sanctions being imposed on SMU as a result of these investigations. One distinction which makes SMU different from the NCAA and the SWC is that the NCAA and the SWC are regulators, and SMU is the regulated entity.

On February 6, 1986, the night before a pre-trial conference was scheduled, the District Court notified counsel that argument on SMU's motion to intervene (which had then been pending for several months) would be considered the next day at the pre-trial conference. Both the NCAA and the SWC took the position that SMU should be allowed to intervene. At the pretrial conference held on February 7, 1986, the Court asked for oral argument and then denied SMU's motion. The rationale stated by the Court was that, because SMU had the same ultimate objective as the NCAA and the SWC, namely nondisclosure, the NCAA and the SWC would adequately represent SMU's interests. After denying intervention, the Court stated that it would decide the question of whether the NCAA and the SWC were governmental bodies under the TORA before determining whether any exemptions from production applied under the Act. The Court further stated that if it found that

the NCAA and the SWC were "governmental bodies," it would entertain another motion from SMU for leave to intervene.

SMU did not believe the NCAA and the SWC would adequately represent it and requested an evidentiary hearing for evidence on whether it would be adequately represented. The District Court denied this request. An appeal of this denial and a motion for stay pending appeal were filed and denied. There after the District Court held that the NCAA and the SWC were "governmental bodies." (See Memorandum Opinion And Order of May 15, 1986, attached as Appendix B). SMU filed a second motion for intervention and for an evidentiary hearing. Granting of the motion would have allowed SMU to participate in the determination of whether exemptions provided by the TORA, or otherwise applicable, applied to any of the requested records of SMU and whether SMU owned the records which were in the possession of the NCAA or the SWC. The motion was denied, and an appeal was instituted from this denial. The two denials of intervention and evidentiary hearings were consolidated on appeal.

The District Court subsequently held that no exemption from production under the TORA applied. The Court ordered production of voluminous records which SMU had provided to the NCAA and the SWC on a confidential basis. (See Order dated August 18, 1986, and Memorandum Opinion And Order dated November 4, 1986, attached as Appendices C and D). No attempt was made to protect the confidentiality of SMU, its coaches, or alumni who had cooperated under rules which were designed to assure confidentiality. Although the redaction of certain information,

including the names of the student athletes, was ordered, SMU does not believe the redaction is sufficient to protect the identities of the students.

Only three direct references to SMU are in the three memorandum opinions and/or orders of the District Court. The first reference is in the May 15, 1986, Memorandum Opinion and Order (Appendix B, page 21a). and simply lists SMU as a member of the SWC. The second and the third is in the August 18, 1986, Order (Appendix C, page 56a), and those references are to the effect that SMU's Motion For Leave To Intervene had been denied. Neither the NCAA nor the SWC conferred with SMU concerning their handling of the present litigation or presented any testimony from SMU. The NCAA and the SWC did not present evidence on the fact that SMU claimed ownership of requested documents, on the impact on SMU of the disclosure of the documents, on the effect disclosure would have on SMU's right to privacy, on the effect disclosure would have on SMU's freedom of association, or on the effect disclosure would have on SMU under the Buckley Amendment.

There is no question that the disclosure of the documents will result in injury. As the District Court recognized:

The documents submitted for *in camera* inspection contain financial information, allegations of misconduct and responses thereto as well as other information which would doubtless be characterized as private, intimate or embarrassing by the individuals who are the subject of the information . . .

Memorandum Opinion And Order dated November 4, 1986 (Appendix D, page 77a) . The District Court

concluded that it would not attempt to control the media's use of the documents, but made the following observation:

[S]ome of the documents ordered released contain personal or sensitive information; consequently, the Court has some concern about their fair and legitimate use. The content of some of the very documents sought by Plaintiffs and Intervenors demonstrates an irresponsible, incomplete, and haphazard approach taken by the media in reporting college athletic events and recruitment.

Memorandum Opinion And Order of November 4, 1986 (Appendix D, page 93a). The records ordered produced were part of a proceeding which lacked most judicial safeguards for those involved. Unsubstantiated documents, which contain serious allegations which the NCAA and the SWC did not find to be true, are now ordered to be produced for the media.

SMU's interests were not adequately represented. The District Court did not determine the fundamental question of whether member institutions which provided records and information to the NCAA or the SWC on a confidential basis continued to have property rights in the documents submitted. The District Court did not determine whether the disclosure of these records would violate the property rights of the member institutions. The District Court denied intervention on the rationale that the NCAA and the SWC would adequately represent a member institution, although the District Court noted that it was "not convinced that the information in issue is maintained by

the NCAA and the SWC "acting for their member universities" and observed that, because the documents and information were often used against the member universities, "[i]t can hardly be argued that the information is held for the member universities." Memorandum Opinion And Order of November 4, 1986. (Appendix D, page 91a).

Fundamental differences exist between the NCAA, the SWC, the regulators, and SMU, the regulated. SMU did not agree with the NCAA on many matters relating to the conduct or the results of the investigation. During the investigation, SMU questioned whether the NCAA had improperly disclosed information to one of the newspapers which is a plaintiff in this action, and the NCAA imposed harsh sanctions against SMU.

When a "governmental body" receives a request for documents and does not produce the documents or seek an opinion from the Texas Attorney General, the TORA can be construed to call for certain presumptions. After finding that the NCAA and the SWC were "governmental bodies" which had not sought an opinion, the District Court relied extensively on these presumptions. Because SMU was not a "governmental body" (so found by the state court) subject to the TORA and contends that it continues to own the requested records, the TORA presumptions would not have applied to SMU.

The District Court applied a presumption that "the information sought is public" and held that "this presumption could be overcome [by the NCAA and SWC only by] a compelling demonstration that the information should not be made public." Memorandum Opinion And Order dated November 4, 1986 (Appen-

dix D, page 71a). Because of this presumption, the District Court required the NCAA to make a compelling demonstration that the invasion of privacy, which the court recognized would be inherent in the disclosure of information, outweighed the public interest in disclosure of the documents. Because of this presumption, the District Court set an almost impossible standard in the balancing test it utilized, stating that the burden of showing that the requested information is not of legitimate concern to the public had shifted to the NCAA and the SWC. Memorandum Opinion And Order dated November 4, 1986 (Appendix D, page 74a). This presumption was allowed to overcome the same common law privacy provisions of the TORA and played a role in the denial of the inter/intra-agency exemptions under the TORA. Because the District Court found that this presumption was in effect, the defendants had to make a compelling demonstration that the information at issue should not be released. Had SMU been allowed intervention and established ownership, the presumption that "the information sought is public" would not have applied to SMU.

Although the District Court denied intervention on the basis that the NCAA and the SWC would adequately represent SMU, they did not. The District Court's subsequent opinions raised a substantial question as to whether SMU was adequately represented. The District Court instructed the SWC to "[f]ile a brief setting out those cases, opinions or decisions which support their claims within twenty (20) days of the date of this Order." (Appendix B, page 44a). Because the SWC did not comply with the District Court's instruction, the Court gave little, if any, con-

sideration to the position of the SWC on the application of exemptions provided for in the TORA. "Pursuant to the Court's scheduling order of June 17, 1986, the parties with the exception of the SWC, timely filed briefs concerning the remaining issues in this case. The SWC did not submit a brief to the Court." (Appendix C, page 47a). The District Court's second opinion largely deals with exemptions or exceptions claimed by the NCAA and not by the SWC.

The District Court also complained of other matters concerning the response of the NCAA and the SWC. In discussing the common law privacy claim, the District Court noted:

Moreover, the Defendants have failed to point out the demonstrable evidence which establishes serious doubt about the truth of any particular piece of information. The Act requires that the governmental body 'determine which specific exception applies to particular information. Open Records Decision No. 150 (1977). A general claim that an exception applies to an entire report, when that exception is clearly not applicable to all of the information in the report, does not comport with the procedural requirements of the Act.' *Id.* ORD-419 (1984). Both the Act and this Court's May 15, 1986, Order require that Defendants specify the exemption claimed for each piece of information. Specificity is lacking with regard to this claimed exemption.

Memorandum Opinion And Order dated November 4, 1986 (Appendix D, page 83a). The District Court also said:

The NCAA has not attempted to assist the Court in separating advice, opinion and recommendation from objective fact. Rather, it claims that entire documents, a significant number of which consist of hundreds of pages, are excepted by this section.

Memorandum Opinion And Order dated November 4, 1986 (Appendix D, page 89a). The NCAA asserted in its answer that necessary parties were absent. Having denied SMU an evidentiary hearing where SMU would have made the required showing, the following observation by the District Court is somewhat ironic:

[T]he record is void of any evidence that nonjoinder would leave any of the member universities subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of their claimed interest.

Memorandum Opinion and Order dated August 18, 1986 (Appendix C, pages 57a-58a).

In all fairness to the attorneys for the associations, the NCAA and the SWC were not in the same position as SMU, did not have all of SMU's defenses, did not want to represent SMU, and indicated to the District Court that SMU should be allowed to represent itself. There is no indication that the NCAA and the SWC considered it their duty to represent SMU or that they attempted to represent SMU. The NCAA and SWC represented themselves. The NCAA asserted that disclosure would violate its property rights and infringe its fundamental rights of privacy, freedom of association, academic freedom, and right of self-critical analysis. Order of August 18, 1986 (Ap-

pendix C, page 48a). Moreover, subsequent developments show that the NCAA and the SWC were not in the same legal position as SMU because they did not have the same legal rights which SMU wanted to assert. The District Court determined that the defenses of self-critical analysis, privacy, freedom of association, academic freedom, and that rights of an educational institution under the TORA were not available to the NCAA. The District Court thus looked to the association to assert rights for parties denied intervention, which the associations did not have. The District Court attempted to justify this by holding that, "[T]he defendants as custodians of the information sought . . . may assert any of the exceptions" Considering a defense presented by a party who does not have the right to assert that defense is not the same as hearing evidence and argument from a party who does have the defense.

These defenses did not receive a fair consideration. The District Court pointed out that "[f]irst, the NCAA cannot assert possible harm to unrelated third parties in asserting its own privacy interests." Order of August 18, 1986 (Appendix C, page 53a). It was observed that "[t]he NCAA has failed to demonstrate or offer any direct authority for the proposition that it is an academic institution of any sort entitled to academic freedom." Order of August 18, 1986 (Appendix C, page 55a). The defense of self-critical analysis by the NCAA was rejected because "[i]n this case the 'self critical analysis' was done by the schools themselves or was a product of the NCAA investigating the schools. It was not a product of the NCAA investigating itself." Order of August 18, 1986 (Appendix C, page 66a).

Under the circumstances of this case, where a highly contested investigation was in progress, the interests of the regulator and the regulated were so diverse that the attorneys for the NCAA and the SWC would have had an ethical conflict if they had attempted to represent SMU. The Texas Code of Professional Responsibility provides that a lawyer should not undertake representation of two clients whose interests are "conflicting, inconsistent, diverse, or otherwise dissonant." EC5-14. It provides that "[t]here are few situations in which [a lawyer] would be justified in representing in litigation multiple clients with potentially different interests." EC5-15. Under the Code "[a] lawyer shall decline proffered employment the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected . . . except if each [party] consents to the representation after full disclosure. . . ."

After having denied SMU intervention the District Court was then faced with the problem of the existing parties not having the defenses SMU wished to assert. For example, even though SMU had been denied the right to intervene and assert the defense of self-critical analysis, the District Court considered and rejected this defense for the NCAA members. After referring to the NCAA's argument on freedom of association as "somewhat vague," the District Court stated that "[t]he NCAA has failed to establish how application of the Act would or could deprive the NCAA of any freedom of association," and then concluded that members, one of which it had refused the right to intervene, were not harmed. When it resolved these defenses, the District Court in large part viewed

these matters from the perspective of the NCAA and the SWC and not their individual members.

The District Court found that the NCAA and the SWC were not educational agencies or institutions. Memorandum Opinion And Order dated November 4, 1986 (Appendix D, page 91a). The TORA recognizes an exception from production for an educational institution with regard to "student records." This important exception from production under the TORA did not receive proper consideration. SMU is an educational institution and it clearly has the right as well as the obligation to protect "student records," as defined under section 3(a)(14) of the TORA, and "educational records," as defined under the Family Educational Rights and Privacy Act of 1979, 20 U.S.C. § 1232(g) (the "Buckley Amendment"). The District Court refused to give SMU the opportunity to intervene, as federal law requires. Moreover, there is an indication that the defenses SMU wished to assert were not adequately considered from the standpoint of a member institution rather than from the standpoint of the NCAA and the SWC.

In a proposed answer, which SMU filed promptly after the District Court held that the independent basis for federal jurisdiction was not applicable, SMU asked that the case be remanded to state court. This case involved a novel application of a state statute and should have been decided in state court. The NCAA and the SWC also requested remand, but the District Court found that they had, by their conduct, waived their right. SMU did not waive the right to request that this case be tried in the state court system, and had so requested.

ARGUMENT

It is important to note that, while the Court of Appeals denied intervention, it recognized that SMU "may have a slightly greater interest in the litigation than the association." The Fifth Circuit then held in this case, *Kneeland v. N.C.A.A.*, 806 F.2d 1285 (5th Cir. 1987), and has held in other cases, such as *Bush v. Viterna*, 740 F.2d 350 (5th Cir. 1984); and *Ordinance Container Corp. v. Sperry Rand Corp.*, 478 F.2d 844 (5th Cir. 1973), that when the party seeking intervention and the existing party seek the same result, adversity of interest must be established. That decision is contrary to decisions of this Court. A conflict, as well as an inconsistent application within the Fifth Circuit, also exists between circuits on whether intervention should be allowed. Other circuits have held that intervention should be allowed unless it is clear that applicants interests are already represented by the existing parties. This simple approach using the language of the rule allows intervention when there is a common sense reason for doing so. Requiring a showing of actual adverse interest without an evidentiary hearing allows a denial of intervention, without a considered review of the facts, on a standard different from that required under Rule 24(a)(1) of the Federal Rules of Civil Procedure.—

Under previous rulings of this Court, Rule 24 should be construed liberally in favor of intervention. *e.g.*, *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967). *Cascade Natural Gas Corp.*, 386 U.S. at 133-134, reviewed the 1966 amendment to Rule 24 and noted that the amendment "was not merely a restatement of existing federal practice at law and in equity," adding that "some elasticity" was

injected. The leading case on the standard for intervention under the amended rule is *Trbovich v. United Mine Workers*, 404 U.S. 528 (1972). The Court in *Trbovich* held that the test is whether the intervenor can show that representation of his interest by another party *may* be inadequate and that the burden of making that showing should be treated as minimal or slight.

It is an important fact that SMU claims a property right in the documents sought from the defendant organizations and will be injured in a way other members will not be injured if the documents' continued confidentiality is not protected. The Supreme Court has previously acknowledged that an interest in property is the most elementary type of right that Rule 24(a)(1) is designed to protect. *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967). Other circuits have relied on the protection of property interests in granting intervention. A property interest has been acknowledged by the Fifth Circuit as sufficient to allow intervention. *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118 (5th Cir.), *cert. denied*, 400 U.S. 878 (1970). In *Atlantis Development Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967), the intervenor asserted an ownership interest in a coral reef on which the United States was attempting to stop development. In *Corby Recreation, Inc. v. General Electric Co.*, 581 F.2d 175 (8th Cir. 1978), a former owner of property who had an insured interest at the time of a fire was allowed to intervene in a suit by the present owner of the property.

SMU should have been granted leave to intervene to protect its right to privacy, a right protected by the United States Constitution, *Pierce v. Society of*

Sisters, 268 U.S. 510, 535 (1925); and *Meyer v. Nebraska*, 262 U.S. 390 (1923). SMU should have been allowed to intervene also to protect its right to freedom of association, which is protected by the United States Constitution. *NCAA v. Alabama*, 357 U.S. 449 (1958). The Fifth Circuit has recognized that due process requires that all parties whose constitutional rights are not adequately protected by other parties should have the right to intervene and present evidence in support of their positions. *Jones v. Caddo Parish School Board*, 499 F.2d 914, 917-18 (5th Cir. 1974). This is because the protection of constitutional rights demands a scrupulous regard for due process considerations. *Adams v. Baldwin County Board of Education*, 628 F.2d 895, 897 (5th Cir. 1980). Constitutional rights must be protected in all cases, not just in school desegregation cases.

The Supreme Court should make it clear that those opposing intervention must prove that existing parties will adequately represent the applicant. The Court at least should make it clear who has the burden of proving the adequacy of representation. The 1966 Amendment to Rule 24(a) made a change. The rule on intervention of right was changed to provide that "[u]pon timely application anyone shall be permitted to intervene in an action . . . unless the applicant's interest is adequately represented by existing parties." The rule had previously provided for intervention "when the representation of the applicant's interest by existing parties is or may be inadequate." This language appears to have changed the burden from the proponent to the opponent. The Court of Appeals for the District of Columbia has placed the burden of showing adequacy on the party opposing

intervention. *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969); and *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967). This Court should state whether Rule 24(a)(1) means what it says.

In this Court and other courts of appeal, a relationship of regulator and regulated has often resulted in allowance of intervention. In *Trbovich*, 404 U.S. at 538-39, this Court, in allowing intervention, stated:

The Secretary contends that petitioner's only legally cognizable interest is the interest of all union members in democratic elections, and he says that interest is identical with the interest represented by the Secretary in Title IV litigation. Hence he argues that petitioner's interest must be adequately represented unless the court is prepared to find that the Secretary has failed to perform his statutory duty. We disagree.

The statute plainly imposes on the Secretary the duty to serve two distinct interests, which are related, but not identical. First, the statute gives the individual union members certain rights against their union, and 'the Secretary of Labor in effect becomes the union member's lawyer' for purposes of enforcing those rights. 104 Cong. Rec. 10947 (remarks of Sen. Kennedy). And second, the Secretary has an obligation to protect the 'vital public interest in assuring free and democratic union elections that transcends the narrower interest of the complaining union member.' *Wirtz v. Local 153, Glass Bottle Blowers Assn.*, 389 U.S. 463, 475, 19

L.Ed.2d 705, 88 S.Ct. 643 (1968). Both functions are important, and they may not always dictate precisely the same approach to the conduct of the litigation. Even if the Secretary is performing his duties, broadly conceived, as well as can be expected, the union members may have a valid complaint about the performance of 'his lawyer.' Such a complaint, filed by the member who initiated the entire enforcement proceeding, should be regarded as sufficient to warrant relief in the form of intervention under Rule 24(a)(2).

This holding is based on the contrast between the broad responsibilities of the regulator and the specific interests of the regulated, and the inherent conflicts between the regulator and the regulated. *LaRouche v. FBI*, 677 F.2d 256 (2nd cir. 1987); and *Marshall v. International Brotherhood of Teamsters*, 617 F.2d 154 (6th Cir. 1980); and *National Farm Lines v. Interstate Commerce Com.*, 564 F.2d 381 (10th cir. 1977).

Other circuits have allowed intervention when the party seeking intervention sought the same ultimate result as existing parties, even though the position of the party seeking intervention was not wholly adverse to the position of existing parties. In *Corby Recreation, Inc. v. General Electric Co.*, 581 F.2d 175 (8th Cir. 1978), a property owner whose interests were entrusted to and leased by the United States was found to have passed the "interest test" and allowed to intervene in a suit by the lessee against the United States when the lessor imposed additional lease restrictions. "[T]he interest test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with

efficiency and due process." *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980); *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967); and *Sanguine, Ltd. v. U.S. Dept. of Interior*, 736 F.2d 1416, 1420 (10th Cir. 1984). The question should be whether the party seeking intervention is in a different position or could add something to the case. *Sagebrush Rebellion Inc. v. Watt*, 713 F.2d 525 (9th Cir. 1983) (national wildlife organization allowed to join government agencies in dispute involving wildlife); *Smith v. Pangilinan*, 651 F.2d 1320 (9th Cir. 1981) (Attorney General must be allowed to join Filipino citizens in suit relating to immigration); *Idaho v. Freeman*, 625 F.2d 886 (9th Cir. 1980) (womens rights organization must be allowed to join states and state legislators in suit relating to ERA); and *Natural Resources Defense Council Inc. v. United States Nuclear Regulatory Comm'n.*, 578 F.2d 1341 (10th Cir. 1978) (mining congress and a potential licensee must be allowed to join another industry member as a party). For example, in *New York Public Interest Research Group, Inc. v. Regents of University of State of New York*, 516 F.2d 350 (2d Cir. 1975), an association of pharmacists and three pharmacists sought to intervene in a lawsuit brought by consumers against a university seeking to enjoin enforcement of university regulations which prohibited the advertisement of prescription drug prices. The intervenors and the university all sought the same result: upholding the regulations. The court held that because the pharmacists and the association sought to protect their own interests, which may differ significantly from the university's, the pharmacists and the association should have an opportunity to make their own arguments and protect their own interests. *Id.* at 352. Further, the court stated its sat-

isfaction that the pharmacists and association would make a more vigorous presentation of a defense peculiar to themselves. *Id.*

Other circuits have been careful to allow intervention when, as in the present case, there is substantial discord between the existing party and the party requesting intervention or a conflict of interest. *SEC v. Flight Trans. Corp.*, 699 F.2d 943 (8th Cir. 1983); and *New Mexico v. Aamodt*, 537 F.2d 1102 (10th Cir. 1976). Other circuits have allowed intervention when there was in fact, as in the present case, a failure to adequately represent the party requesting intervention. *Francis v. Kroger Co.*, 649 F.2d 1216 (6th Cir. 1981), (negotiation of proposed settlement); and *County of Fresno v. Andrus*, 622 F.2d 436 (9th Cir. 1980) (failure to pursue argument). Similarly SMU was not adequately represented, but was nevertheless denied the right to intervene, and the representation furnished was not reviewed.

CONCLUSION

A Writ of Certiorari should issue to review the affirmation by the Fifth Circuit Court of Appeals of the District Court's denial of intervention. In this case, the party with the greatest interest was denied the right to protect that interest. That denial was premised solely on the unsupported and erroneous conclusion that existing defendants would adequately represent the interests of SMU because they sought the same ultimate result. In fact, the existing defendants were not in the same factual position as SMU and did not have all the same legal rights. The District Court should not have refused to hold an evidentiary hearing and, following such a refusal, the

Court of Appeals should have reviewed the representation provided. Accordingly, the petition for writ of certiorari should be granted.

Respectfully Submitted,

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Attorney for Petitioner,
SOUTHERN METHODIST UNIVERSITY



APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 86-1118, 86-1206 and 86-1477
Summary Calendar

D.C. Docket No. A-85-CA-616

CAROLE KNEELAND AND BELO BROADCASTING CORPORATION,
Plaintiffs-Appellees,
A.H. BELO CORPORATION, d/b/a the DALLAS MORNING
NEWS, *et al.,*
Intervenors-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.,*
Defendants,

SOUTHERN METHODIST UNIVERSITY,
Movant-Appellant.

CAROLE KNEELAND AND BELO BROADCASTING CORPORATION,
Plaintiffs-Appellees,

and

A.H. BELO CORPORATION, d/b/a the DALLAS MORNING
NEWS, *et al.,*
Intervenors-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.,*
Defendants,

WILLIAM MARSH RICE UNIVERSITY,
Movant-Appellant.

CAROLE KNEELAND AND BELO BROADCASTING CORPORATION,
Plaintiffs-Appellees,

and

A.H. BELO CORPORATION, d/b/a the DALLAS MORNING
NEWS, *et al.*,

Intervenors-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.*,

Defendants,

SOUTHERN METHODIST UNIVERSITY,

Movant-Appellant.

FILED

FEB. 17, 1987

**APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE WESTERN DISTRICT OF TEXAS**

Before CLARK, Chief Judge, RUBIN, and JOHNSON, Cir-
cuit Judges.

JUDGEMENT

This cause came on to be heard on the record on appeal
and was taken under submission on the briefs on file.

ON CONSIDERATION WHEREOF, It is now here or-
dered and adjudged by this Court that the judgment of
the District Court in this cause is affirmed in part, and
in all other respects the appeal is dismissed.

IT IS FURTHER ORDERED that movants-appellants
pay to plaintiffs-appellees and intervenors-appellees the cost
on appeal to be taxed by the Clerk of this Court.

January 7, 1987

ISSUED AS MANDATE: FEB. 13, 1987

By /s/ Sarah L. Holmer
Deputy

CAROLE KNEELAND AND BELO BROADCASTING CORPORATION,
Plaintiffs-Appellees,
 A.H. BELO CORPORATION, d/b/a the DALLAS MORNING
 NEWS, *et al.,*
Intervenors-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.,*
Defendants,
 SOUTHERN METHODIST UNIVERSITY,
Movant-Appellant.

CAROLE KNEELAND and BELO BROADCASTING CORPORATION,
Plaintiffs-Appellees,

and

A.H. BELO CORPORATION, d/b/a the DALLAS MORNING
 NEWS, *et al.,*
Intervenors-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.,*
Defendants,
 WILLIAM MARSH RICE UNIVERSITY,
Movant-Appellant.

CAROLE KNEELAND and BELO BROADCASTING CORPORATION,
Plaintiffs-Appellees,

and

A.H. BELO CORPORATION, d/b/a the DALLAS MORNING
 NEWS, *et al.,*
Intervenors-Appellees,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *et al.,*
Defendants,
 SOUTHERN METHODIST UNIVERSITY,
Movant-Appellant.

Nos. 86-1118, 86-1206 and 86-1477
Summary Calendar.

**United States Court of Appeals,
Fifth Circuit.**

Jan. 7, 1987.

Two universities sought permission to intervene in litigation brought by various media plaintiffs seeking documents from two voluntary university regulatory associations. The United States District Court for the Western District of Texas, James R. Nowlin, J., denied motion to intervene, and universities appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) universities' interests were being adequately represented by defendant associations; (2) one university's motion to intervene was untimely; and (3) court lacked jurisdiction over denial of permissive intervention absent clear showing of abuse of discretion.

Affirmed in part and dismissed in part.

**Appeals from the United States District Court for the
Western District of Texas.**

Before CLARK, Chief Judge, RUBIN and JOHNSON,
Circuit Judges.

CLARK, Chief Judge:

Southern Methodist University (SMU) and William Marsh Rice University (Rice) appeal from the denial of their motions to intervene in litigation brought by various media plaintiffs seeking documents from the National Collegiate Athletic Association (NCAA) and the Southwest Athletic Conference (SWC). We affirm.

I. Facts and Proceedings

On October 3, 1985, Belo Broadcasting Corporation and Carole Kneeland, a news correspondent and bureau chief for Belo, filed suit in Texas state court against the NCAA and the SWC. The plaintiffs sought a writ of mandamus compelling the NCAA and the SWC to make available all records of NCAA investigations since 1980 of college football recruiting practices at SMU. The plaintiffs primarily relied on the Texas Open Records Act (TORA) as the basis for requiring disclosure. A.H. Belo Broadcasting Corporation d/b/a The Dallas Morning News, The Times Herald Printing Company, and David Eden, Assistant Manager Sports Editor of the Times Herald, intervened as plaintiffs. The intervening plaintiffs sought records pertaining to any NCAA investigations of all schools that are members of the SWC. The NCAA removed the case to the United States District Court for the Western District of Texas on October 25, 1985.

SMU, a member of both the NCAA and the SWC, filed its first motion for leave to intervene as a defendant on November 26, 1985. The district court denied SMU's motion on February 7, 1986. It concluded that because SMU had the same ultimate objective as the NCAA and the SWC—nondisclosure—and because SMU showed no adverse interest, collusion, or nonfeasance, the existing defendants adequately represented SMU's interests. The district court stated that in its view the NCAA and SWC could raise any defense available to SMU under TORA. Finally, the district court determined that allowing intervention would cause undue and unnecessary delay in resolving the case.

Rice, also a member of the NCAA and the SWC, filed its motion to intervene on February 13, 1986. On February 20, 1986, the district court denied the motion. It found that Rice's interests were adequately represented by the existing defendants and that allowing intervention would

unduly delay the proceedings. In addition, the court ruled that Rice's motion was untimely. The motion was filed eight days before the end of discovery and only twenty days before the scheduled date for the first phase of the trial.

That first phase occurred on March 6 and 7, 1986. The district court's opinion of May 15, 1986, found that the NCAA and the SWC were "governmental bodies" as defined by section 2 of TORA. SMU filed its second motion to intervene on May 27, 1986 and requested an evidentiary hearing on its motion. On June 18, 1986 the district court denied SMU's second motion without holding an evidentiary hearing. The court again concluded that any interest SMU had in the litigation was adequately represented by the existing defendants. The district court also expressed concern that allowing intervention at such a late stage of the litigation would unduly prejudice the plaintiffs.

The second phase of the trial was held on July 24 and 25, 1986. The district court's opinion dated August 18, 1986, held that the NCAA and the SWC had proven no affirmative defenses to disclosure. The court stated that it would issue a separate opinion on availability of exceptions to disclosure under TORA.

SMU and Rice filed timely notices of appeal from the district court orders denying their motions to intervene. Their appeals have been consolidated. They argue that the district court erred in denying them intervention as of right because the existing defendants did not adequately represent their interests. They also contend that the district court abused its discretion in refusing to grant them permissive intervention. We will discuss these arguments in turn.

II. Intervention of Right

Federal Rule of Civil Procedure 24(a) allows certain interested parties to intervene as of right.¹ Subsection (1)

¹ The Rule provides as follows:

of the Rule, which allows intervention of right when provided by statute, is not applicable to this case. SMU and Rice rely on subsection (2).

It is well-settled that to intervene as of right [under Rule 24(a)(2)] each of the four requirements of the rule must be met: (1) the application for intervention must be timely; (2) the applicant must have an interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may, as a practical matter, impair or impede his ability to protect that interest; (4) the applicant's interest must be inadequately represented by the existing parties to the suit.

New Orleans Public Service, Inc. v. United Gas Pipe Line Co., 732 F.2d 452, 463 (5th Cir.) (en banc) (quoting *International Tank Terminals, Ltd. v. M/V Acadia Forest*, 579 F.2d 964, 967 (5th Cir. 1978)), *cert. denied*, 469 U.S. 1019, 105 S.Ct. 434, 83 L.Ed.2d 360 (1984). If a party seeking to intervene fails to meet any one of those requirements then it cannot intervene as of right. *Id.* The parties disagree to some extent on the universities' interests in the documents and the degree to which disposition of the lawsuit will impair the ability of SMU and Rice to protect their interest. We do not need to deal with those issues because our resolution of the timeliness and the adequacy of representation requirements controls our disposition of this ground of appeal.

(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

A. Adequacy of Representation

This circuit holds that when the party seeking to intervene has the same ultimate objective as a party to the suit, the existing party is presumed to adequately represent the party seeking to intervene unless that party demonstrates adversity of interest, collusion, or nonfeasance. *Bush v. Viterna*, 740 F.2d 350, 355 (5th Cir. 1984). All parties to this appeal concede that the NCAA and the SWC have the same ultimate objective as SMU and Rice: to prevent disclosure of the documents. SMU and Rice do not allege collusion or nonfeasance. Instead, they argue that they have a stronger interest in the litigation and so are the appropriate parties to the suit. In addition, they argue that the existing parties have not voiced their concerns and that as members of the NCAA and the SWC they have defenses to disclosure that are unavailable to the existing defendants.

SMU and Rice argue that their interests differ from the interests of the NCAA and the SWC because the associations have as members both public universities which would be subject to TORA and private universities which would not be subject to TORA. SMU also contends that it should be allowed to intervene because the documents involved are about SMU. At most, these allegations establish that SMU and Rice may have a slightly greater interest in the litigation. They do not show any adversity of interest.

SMU and Rice contend that their interests are adverse to the NCAA and the SWC because the associations are the regulators while the universities are the regulated. SMU and Rice rely on cases such as *Trbovich v. United Mine Workers*, 404 U.S. 528, 92 S.Ct. 630, 30 L.Ed.2d 686 (1972), and *National Farm Lines v. ICC*, 564 F.2d 381 (10th Cir. 1977). These cases are not apposite. The adversity they discuss between federal regulatory agencies and the private regulated parties stem from conflicts be-

tween agency attempts to represent the regulated parties and statutory mandates to serve the "public interest." See *Trbovich*, 404 U.S. at 538-39, 92 S.Ct. at 636; *National Farm Lines*, 564 F.2d at 384. No such conflicts exist between the regulated universities and the voluntary regulatory associations in this case. SMU and Rice have demonstrated no adversity of interest that justifies allowing intervention.

SMU and Rice also maintain that they should be allowed to intervene because "no existing party has voiced [their] concerns" and because they "ha[ve] a defense not available to the present defendant[s]." *Bush*, 740 F.2d at 357. SMU and Rice argue that they should be allowed to assert their right to privacy, academic freedom, freedom of association, and privilege of self-critical analysis as defenses to disclosure. But the NCAA and the SWC expressed all of these concerns. In addition, the plaintiffs admit that under Texas law the NCAA and the SWC have standing to raise any defenses to disclosure their members could raise. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 678 (Tex.1976). The district court agreed and relied on this admission in denying SMU and Rice intervention and in holding that institutions whose records were sought were not parties to be joined under Federal Rule of Civil Procedure 19(a). See *Kneeland v. NCAA*, No. A-85-CA-616, slip op. at 15-17 (Aug. 18, 1986).

SMU and Rice refer to the district court's holding that the NCAA and the SWC have no affirmative defenses to disclosure. They contend this indicates that the existing defendants cannot adequately represent the interest of SMU and Rice. They argue that this holding means the NCAA and the SWC lacked standing to raise various defenses of SMU and Rice. This is not correct. Any purported inconsistencies between the district court's decision and Texas law may be appealed by the NCAA and the SWC. Such alleged errors of law do not give SMU and Rice a basis to intervene.

SMU also challenges the district court's refusal to hold an evidentiary hearing on its second motion to intervene. In support of its request for an evidentiary hearing, however, SMU relies on cases requiring an evidentiary hearing on motions to intervene in school desegregation cases. *See, e.g., Adams v. Baldwin County Board of Education*, 628 F.2d 895, 897 (5th Cir. 1980). School desegregation cases are unique in requiring evidentiary hearings on motions to intervene, *see id.*; *Calhoun v. Cook*, 487 F.2d 680, 684 (5th Cir. 1973). They are distinguishable from the present case. If such precedents were applicable, an evidentiary hearing is not required in the present case because the record clearly demonstrates that SMU is not entitled to intervene. *See United States v. Perry County Board of Education*, 567 F.2d 277, 280 (5th Cir. 1978).

The district court properly concluded that the NCAA and the SWC adequately represent SMU and Rice.

B. Timeliness

Rule 24(a) requires that an application to intervene must be timely. The district court denied Rice's motion to intervene in part because the court concluded that the motion was untimely. The question of timeliness is largely within the discretion of the district court, and we will reverse the district court's determination only for abuse of discretion. *Howse v. S/V "Canada Goose I,"* 641 F.2d 317, 320 (5th Cir. 1981) (Unit B). The district court is to consider four factors in determining the timeliness of a motion to intervene: the length of time the party knew or should have known of its interest in the lawsuit, the prejudice to existing parties, prejudice to the intervening party if intervention is denied, and the presence of unusual circumstances. *Lelsz v. Kavanagh*, 710 F.2d 1040, 1043 (5th Cir. 1983). In today's case, Rice's motion to intervene was filed almost four months after the lawsuit was removed from state court and only eight days before the end of discovery. Rice does not suggest that it lacked

ample notice of its interest in the lawsuit; nor does Rice suggest any unusual circumstances mitigating its delay. The district court did not abuse its discretion in finding Rice's motion to be untimely.

III. Permissive Intervention

Permissive intervention "is wholly discretionary with the [district] court . . . even though there is a common question of law or fact, or the requirements of Rule 24(b) are otherwise satisfied."² *New Orleans Public Service, Inc. v. United Gas Pipe Line Co.*, 732 F.2d 452, 470-71 (5th Cir.) (en banc) (quoting 7C C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1913, at 376-77 (2d ed. 1986)), *cert. denied*, 469 U.S. 1019, 105 S.Ct. 434, 83 L.Ed.2d 360 (1984). In acting on a request for permissive intervention the district court may consider, among other factors, whether the intervenors' interests are adequately represented by other parties, *id.* at 472, and whether intervention will unduly delay the proceedings or prejudice existing parties, Fed.R.Civ.P. 24(b). Reversing a denial of permissive intervention requires a clear abuse of discretion. *Bush v. Viterna*, 740 F.2d 350, 359 (5th Cir. 1984). This circuit has never reversed a denial of permissive intervention. Such a decision by any federal appellate court

² The Rule provides as follows:

(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"is so unusual as to be almost unique." *United Gas Pipe Line Co.*, 732 F.2d at 471.

The district court properly concluded that the NCAA and the SWC adequately represent the interests of SMU and Rice. In addition, it determined that according party status to SMU and Rice would delay the litigation and prejudice existing parties. The district court also held that Rice's motion was untimely. No clear abuse of discretion was shown. In the absence of a clear abuse of discretion, this court lacks jurisdiction over an appeal from a denial of permissive intervention, *Woolen v. Surtran Taxicabs, Inc.*, 684 F.2d 324, 331 (5th Cir. 1982). We accordingly dismiss this portion of the appeal.

The district court's order is affirmed insofar as it denied intervention of right. In all other respects the appeal is dismissed.

AFFIRMED IN PART; DISMISSED IN PART.

A true copy

Test:

Clerk, U.S. Court of Appeals, Fifth Circuit

By /s/ SARAH L. HOLMES

Deputy

New Orleans, Louisiana FEB 13, 1987

APPENDIX A-1

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

CIVIL NO. A-85-CA-616

CAROLE KNEELAND,
BELO BROADCASTING CORPORATION, et al
vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and
SOUTHWEST ATHLETIC CONFERENCE

FILED
FEB. 21, 1986

ORDER

Before the Court is the Motion of Southern Methodist University for an Evidentiary Hearing, the Entry of Findings of Fact and Conclusions of Law on its Motion to Intervene, and for a Stay of Proceedings pending determination of an appeal of the denial of its Motion for Intervention. The Court has considered the Motion in light of the entire file in this cause, and is of the opinion that the Motion is not meritorious and should be Denied insofar as it seeks another hearing on the Motion to Intervene and a stay of this cause. The Court will enter a written order denying Movant's Motion to Intervene. The Court heard arguments on the Motion to Intervene on February 7, 1986. Nothing suggests that additional facts or authorities would be gleaned from another hearing. In addition, the Court granted Defendant NCAA's Motion for a Separate Trial on the issue of whether the Texas Open

Records Act applied to the Defendants. The Court informed counsel for Southern Methodist University that if the Court determined the Act was applicable the Court would reconsider its ruling denying intervention upon proper motion. In light of these facts and the Court's firm belief that the Movant is adequately represented by the existing Defendants, the Court is of the opinion the instant Motions should be Denied.

ACCORDINGLY, the Movant's Motions for Evidentiary Hearing and Stay of Proceedings Pending Appeal are hereby DENIED. The Court shall enter a written Order denying the Motion to Intervene.

SIGNED and ENTERED this 21st day of February, 1986.

/s/ JAMES R. NOWLIN

JAMES R. NOWLIN

UNITED STATES DISTRICT JUDGE

APPENDIX B

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

CIVIL NO. A-85-CA-616

CAROLE KNEELAND, BELO BROADCASTING CORPORATION,
THE TIMES HERALD PRINTING COMPANY, DAVID EDEN and
A. H. BELO CORPORATION d/b/a BELO CORPORATION NEWS
vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and
SOUTHWEST ATHLETIC CONFERENCE

FILED
MAY 16, 1986

MEMORANDUM OPINION AND ORDER

This cause came before the Court for a non-jury trial on March 6 and 7, 1986. Pursuant to the Court's order bifurcating the trial of this cause, the issues before the Court are the Plaintiffs claims brought pursuant to 42 U.S.C. section 1983, and whether the Texas Open Records Act, TEX. REV. CIV. STAT. ANN. art. 6252-17a (Vernon Supp. 1986) (the "Act"), applies to the National Collegiate Athletic Association (NCAA) and the Southwest Athletic Conference (SWC). The Court has considered the pleadings as well as the evidence adduced at trial and is of the opinion that judgment for the Defendants should be entered on Plaintiffs' claims brought under section 1983, and that both the NCAA and the SWC are subject to the Act.

I. BACKGROUND

The Plaintiffs in this action all sent to the NCAA and SWC requests to inspect and copy certain information re-

lating to infractions or possible infractions of NCAA regulations by various SWC members. Both Defendants alleged they were not "governmental bodies" as defined by the Act and refused to provide access to the information sought by Plaintiffs. Neither Defendant requested that the Texas Attorney General issue an opinion as to whether or not they were subject to the Act though the Act specifically provides for such opinions. *Id.* at § 7. On October 3, 1985, Plaintiffs Kneeland and Belo Broadcasting filed an original petition and application for writ of mandamus in the 261st Judicial District Court of Travis County, Texas. The petition alleges that the Defendants are "governmental bodies" as defined by the Act, and seeks a declaration that the information sought is "public information" under the Act. The petition further seeks a writ of mandamus which directs the Defendants to make available the information sought by the Plaintiffs. Within two weeks of the date that the original petition was filed, A. H. Belo Corporation, d/b/a The Dallas Morning News, and The Times Herald Printing Company and David Eden intervened with similar petitions. On October 26, 1985, the cause was removed to this Court by both Defendants. After a pre-trial conference held on February 6, 1986, the Court granted defendant NCAA's Motion for Separate Trial on the issue of whether the Defendants were "governmental bodies" as defined by the Act, and the Plaintiffs' claims brought under 42 U.S.C. section 1983.

II. THE NCAA

The NCAA is a private association consisting of approximately 900 members located in all fifty states. Approximately one-half of the members are public universities or colleges. The NCAA is a Kansas association whose officers and employees are located in Mission, Kansas. Members of the NCAA are placed in various divisions based upon a variety of factors. Most of the major football playing universities, over one-half of which are public universities, are members of Division 1-A. All members of

the SWC are members of Division 1-A, and eighteen (18) public universities of the State of Texas are members of other divisions of the NCAA. The SWC is also a member of the NCAA.

The NCAA and its member schools are governed by a constitution, bylaws and executive regulations, that are contained in the 1985-86 NCAA Manual. Members must agree to "administer their athletic programs in accordance with the constitution, the bylaws and other legislation of the Association. NCAA Constitution, art. 4 § 2(a). Further, "telecasting, cablecasting or otherwise televising of intercollegiate football games of member institutions may be subject to the provisions of bylaws enacted by the Association." *Id.* art. 3, § 11.

The NCAA holds an annual convention of all members, and meets at other times as prescribed by the Executive Committee. *Id.* art. 5, § 7(a). Between conventions the establishment and direction of the NCAA's general policy is entrusted to a Council of the members, elected at the annual convention. The Council elects nine members of the fourteen member Executive Committee. *Id.* art 5, § 2(c). The Committee has the following duties:

- (1) Transact the business and administer the affairs of the Association in accordance with the policies of the Association and the Council;

* * *

- (2) Require all income from membership dues, from activities of the Association and from other sources, except as may be provided in the constitution, bylaws or executive regulations, to be deposited in the general fund;

* * *

- (3) Adopt regulations providing for the expenditure of Association funds, conduct of Asso-

ciation meets and tournaments, and distribution of the income of the association

....

Id. Neither faculty representatives who serve on committees nor voting delegates to the convention receive compensation, other than travel reimbursement, from the NCAA for the NCAA duties.

The president of the NCAA is John R. Davis, Director of Special Programs and Agriculture at Oregon State University; his term expires in January 1987. The Secretary-Treasurer of the NCAA is Wilford S. Bailey, Professor at Auburn University; his term expires in January 1987. The NCAA Division One Vice President is Arliss Roaden from the Tennessee Technological University; his term expires in January 1987. The NCAA Division Two Vice President was Abe Sponberg from North Dakota State University; his term expired in January 1986. The NCAA Division Three Vice President was Elizabeth Kruczek of Fitchburg State College; her term expired in January 1986. Richard W. Burns, Professor of Teacher Education at the College of Education at the University of Texas at El Paso, was a member of the NCAA Council for a four year period ending in January, 1986. Currently, Albert M. Witte, Professor of Law at the University of Arkansas Law School, is the SWC representative on the NCAA Council.

Until his resignation in January 1986, one year prior to the expiration of his term, Fred Jacoby, SWC Commissioner, served on the NCAA Executive Committee. The 1984-85 Annual Reports of the NCAA contain the Secretary-Treasurer's Report which includes the financial statements of the NCAA for its fiscal years ending August 31, 1984 and August 31, 1985. The report indicates that the NCAA has three principle sources of revenues: dues, television gross rights fees, and championship events and tournaments.

The Bylaws of the NCAA require the payment of annual dues by each member, and the amount of the required annual dues varies depending upon the particular class of membership. The NCAA received dues payments from at least eighteen Texas state universities from the years 1981-82 through 1985-86. During this period, these eighteen Texas state universities paid approximately \$77,000 in dues to the NCAA for the years 1981-82 through 1985-86. Each member of the SWC pays NCAA annual dues of \$1,800.00 and the SWC pays annual dues of \$900.00. These dues are paid by the universities from their auxiliary enterprise accounts. Failure to pay dues results in termination of membership and ineligibility of the delinquent member to compete in meets or tournaments of the NCAA. Income to the NCAA from dues payments are deposited into the same bank account as all other NCAA revenues; the NCAA pays all of its expenses from this same general account. Pursuant to NCAA Bylaw 9-3-(a), the revenue derived from annual dues shall be used "to cover the direct costs of Association publications, convention operations, establishment and maintenance of playing rules, and compilation of playing statistics." NCAA Bylaws art. 9, § 3(a).

The Bylaws of the NCAA provide that the gross rights fee paid for each game of a national telecast or cablecast of member institutions' intercollegiate football games shall be subject to an assessment of four per cent to be paid by the home institution to the NCAA to fund the costs of the NCAA postgraduate scholarship program and football-related services of the NCAA. *Id.* art. 8, § 2(c). In the 1984-85 fiscal year, the NCAA received football television gross rights fees assessments from the University of Texas at Austin and Texas A&M University in the total amount of \$63,960.00. Income to the NCAA from football television gross rights fees assessments are deposited into the same bank accounts as all other NCAA revenues. The NCAA pays all of its expenses from this same general account.

The third principle source of revenue to the NCAA is the receipts from championship meets. Regulation 1 of the Executive Regulations of the NCAA governs NCAA championship meets and tournaments. Member institutions which host NCAA championships are responsible for administering the finances of the tournament in accordance with Regulation 1.

The regulation authorizes the host institution to deduct the greater of 10 to 15 percent of the net receipts or \$200 to \$750, depending upon the particular tournament, in return for hosting the event. A host institution, however, is not entitled to reimbursement for the cost of permanent equipment, local transportation for competing teams and on-campus facility rental charges. Further, the host institution is not entitled to reimbursement for the time and services rendered by the athletic department staff members, including the host institution's athletic director, who administers the tournament. Moreover, costs of the championship event that exceed the NCAA's pre-approved budget are not reimbursed to the host institution.

Texas state universities hosted eleven NCAA championship events on their campuses from the years 1981 through 1984. In 1985, The University of Texas sent the NCAA approximately \$88,000.00 as net receipts from the University's hosting of the NCAA regional baseball tournament. In 1981 and 1982, the University of Texas sent the NCAA \$36,524.83 and \$40,707.32, respectively, as payment of net receipts from hosting NCAA championships. In 1984, the University of Houston paid the NCAA \$151,876.31 as payment of net receipts from hosting NCAA championships.

The NCAA deposits the revenues it receives from Texas public universities, together with the revenues it receives from its other members, into a single general bank account from which the NCAA pays all of its expenses. Revenues received by the NCAA from member institutions which

host NCAA championship events are used to fund all departments of the NCAA, including the enforcement department.

III. THE SWC

The Defendant SWC is an unincorporated non-profit association of nine member universities, four of which are Texas public universities. The Texas public university members are the University of Texas at Austin, Texas Tech University, the University of Houston and Texas A&M University. The other members of the SWC are Baylor University, Southern Methodist University and Texas Christian University, which are private, church-sponsored institutions; William Marsh Rice University, a private institution; and, the University of Arkansas, a public University of the State of Arkansas. The Conference employs a paid staff and incurs general operating expenses for such items as administrative offices, public relations, travel annuities, investigations, donations and miscellaneous matters.

The current president of the Southwest Athletic Conference is Dr. Michael T. Johnson, the faculty representative from the University of Houston. Dr. Johnson on one occasion has had his teaching load reduced by the University of Houston in part to compensate him for his duties as faculty representative to the Southwest Athletic Conference. The University of Houston maintains an executive liability and indemnification policy of insurance covering Dr. Johnson's acts as Southwest Athletic Conference President and faculty representative.

The SWC is governed by a constitution and bylaws, and operates under an annual budget. The 1986 Budget of operating and payroll expenses amounts to approximately \$919,100.00. The receipt of revenue by the SWC is governed by Article IX of the Conference Bylaws. The SWC receives revenue from only five (5) sources: (1) post-season football bowl games; (2) football television broadcasts; (3)

post-season basketball tournaments; (4) basketball television broadcasts; and, (5) interest-bearing bank accounts. SWC members do not pay dues, assessments or fees, though SWC Bylaws provide that if its revenues from member institutions are insufficient to pay its expenses, the conference can make assessments against its member institutions. SWC Bylaws art. 9. The SWC does not receive any federal or state tax-generated revenues or legislative appropriations. Its two principle sources of revenue are derived from television and post-season bowl game revenues. The vast majority of the revenue derived from telecast football games is paid directly to the SWC by its member schools pursuant to a formula set out in the bylaws. SWC Bylaws art. 9.04. (The Conference receives a much smaller portion of its telecast revenues from a broadcasting agreement with RAYCOM, Inc., which telecasts approximately eight SWC games during the season.)

Article 9.04 of the Conference Bylaws provides that any "SWC team competing in a non-conference regionally or nationally televised football game shall retain fifty (50) percent of that team's share of the receipts and fifty (50) percent of that team's share of the receipts shall be paid to the Conference office." SWC Bylaws art. 9.04. Teams competing in regionally or nationally televised conference games "retain thirty (30) percent (15 percent for each team) of the receipts and seventy (70) percent of the receipts shall be paid to the Conference office." *Id.* All television receipts from the syndicated conference football television package (RAYCOM) are paid to the Conference office. This procedure was followed through November 16, 1985. On that date, two weeks after his deposition was taken in this cause, SWC Commissioner Fred Jacoby wrote a letter to the College Football Association requesting that payments for the telecasts of football games played by SWC members during the 1985 football season be sent directly to the SWC. Since that date, the SWC deducts and retains that percentage of the receipts that the bylaws

direct be sent to it, deducts a 4% assessment of the proceeds which is sent to the NCAA, and sends the remaining balance to the SWC school(s) which participated in the televised football game.

The proceeds from national and/or regional telecasts or cablecasts of SWC member schools (other than the RAYCOM telecast) were sent directly to the schools from 1981 through the 1984-85 academic year. Other than RAYCOM contracts, neither the SWC nor the NCAA are parties to any football television contracts under which the SWC schools receive proceeds. The University of Texas at Austin received proceeds of television rights fees by check made payable to the University. Upon receipt the check would be deposited into a University checking account along with other revenues received during a given time period. The athletic department of the University would then submit a local funds voucher to the Bursar's Office where a check would be made payable to either the NCAA, the SWC, or both, in payment of the University's obligation under the respective bylaws of the NCAA and SWC. The University of Houston followed a similar procedure. The funds received by the Southwest Athletic Conference from the member universities come from the auxiliary enterprises of the member universities. Funds received by the SWC from its member schools are deposited into its interest-bearing checking account at the Bank of Dallas from which bank account the SWC pays all of its expenses. The SWC takes money out of its interest-bearing checking account and invests it in certificates of deposit from time to time.

Under Article IX of the SWC Bylaws, each Spring the Commissioner prepares a budget each Spring of the Conference's operating expenses for the following academic year. Once the budget is approved by the SWC's executive committee, the SWC deducts from its current funds an amount equal to the approved budget, and then distributes the remaining funds equally to its member universities.

The funds deducted are used to pay the SWC's operating expenses.

IV. SECTION 1983 CLAIMS

Plaintiffs Kneeland and Belo Broadcasting, as well as Belo Corporation d/b/a The Dallas Mornings News,¹ claim that the Defendants' refusal to provide the records and information requested violated their constitutional right of access to public information, and therefore gives rise to a cause of action under 42 U.S.C. section 1983. The Defendants argue that the Plaintiffs have no constitutional right to the records they seek, and that they did not act under color of state law when they refused to disclose the information.

The Defendants are only subject to a suit under section 1983 if they acted "under color of state law" when they denied Plaintiffs' requests for information. 42 U.S.C. § 1983; *Rendell-Baker v. Kohn*, 457 U.S. 830, 835-36 (1982); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). The Defendants have acted under color of state law if "there is a sufficiently close nexus between the State and the challenged action of the [Defendants] so that the action of the latter may be fairly treated as the action of the State itself." *Jackson*, 419 U.S. at 351. Consequently, the Court must determine whether the alleged infringement of Plaintiffs' constitutional rights is "fairly attributable to the State." *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). No precise formula determines whether otherwise private conduct constitutes state action.² *Arlosoroff v. National Collegiate Athletic Association*,

¹ Plaintiffs Dallas Times Herald and David Eden voluntarily dismissed their § 1983 claims by amendment on February 12, 1986.

² The "under color of state law" requirement of 42 U.S.C. § 1983 reflects the state action requirement of the 14th Amendment; consequently, the semantic distinction between these phases is of no import. *Rendell-Baker*, 457 U.S. at 838 (citing *United States v. Price*, 383 U.S. 787, 794 n.7 (1966)).

746 F.2d 1019, 1021 (4th Cir. 1984). The Court must determine the facts and circumstances of each case in making this determination. *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 722 (1961).

The Fifth Circuit has determined that activities of the NCAA constitute action under color of state law. *Hennessey v. National Collegiate Athletic Association*, 564 F.2d 1136, 1144 (5th Cir. 1977) (adopting memorandum opinion of district court); *Parish v. National Collegiate Athletic Association*, 564 F.2d 1136, 1144 (5th Cir. 1977) (adopting memorandum opinion of district court); *Parish v. National Collegiate Athletic Association*, 506 F.2d 1028, 1032-33 (5th Cir. 1975); accord *Howard University v. National Collegiate Athletic Association*, 510 F.2d 213, (D.C. Cir. 1975). This Court is of the view, however, that the Supreme Court decisions in *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982), and *Blum v. Yaretsky*, 457 U.S. 991 (1982), require a different result.

Under *Rendell-Baker* and *Blum*, state subsidization with public funds and extensive state regulation do not necessarily convert private action into state actions. *Rendell-Baker*, 457 U.S. at 840-41; *Blum*, 457 U.S. 1007-10. Further, the Court noted that a private party's performance of a function which serves the public does not necessarily make its acts state action. "[T]he question is whether the function performed has been 'traditionally the exclusive prerogative of the State.'" *Rendell-Baker*, 457 U.S. at 842 (citations omitted) (emphasis original).

The Plaintiffs have made no showing that the State of Texas or the state universities which are members of the Defendant associations, acted in any manner which caused the Defendants to deny the Plaintiffs' request for information. Further, this Court's ruling that Defendants are governmental bodies under the Act does not compel a finding that Defendants' action amounted to state action. The Act defines a governmental body as an association

“which is supported in whole or in part by public funds, or which expends public funds.” TEX. REV. CIV. STAT. ANN. art. 5262-17a, § F (Vernon Supp. 1986). Under *Rendell-Baker* state subsidization with public funds is not sufficient to convert private action into state action, *Rendell-Baker*, 457 U.S. at 840; consequently, the Court’s determination that Defendants are governmental bodies does not require a finding that their actions are state actions.

Finally, the Plaintiffs have failed to establish that the Defendants perform a public function which is “traditionally exclusively reserved to the state.” The Defendants doubtless perform some sort of public function in regulating the nation’s intercollegiate athletics; however, the state is not necessarily required to undertake such functions. *See Blum*, 457 U.S. at 1004. This conclusion becomes evident in light of the Court’s ruling in *Rendell-Baker*. If the public function performed in that case does not amount to one traditionally exclusively reserved to the state, then neither does regulation of intercollegiate athletics. Regulation of intercollegiate athletics is not a function “traditionally *exclusively* reserved to the state.” *Jackson*, 419 U.S. at 352 (emphasis added); *accord Arlosoroff*, 746 F.2d at 1019; *McHale v. National Collegiate Athletic Association*, No. 85-CV-944 (N.D.N.Y. 1985) (memorandum opinion). Plaintiffs have failed to establish that the Defendants acted under color of state law when they denied Plaintiffs’ request for information. Pursuant to *United Mineworkers v. Gibbs*, 383 U.S. 715, 725-29 (1965), the Court in its discretion, hereby exercises its pendent jurisdiction and retains the Plaintiffs’ state law claims.

V. THE TEXAS OPEN RECORDS ACT

The Act was passed by the 63rd Legislature in 1973. It was part of a wave of governmental reform precipitated by the infamous “Sharpstown Scandal.” The Act begins with a general declaration of policy:

Pursuant to the fundamental philosophy of the American constitutional form of representative government which holds to the principle that government is the servant of the people, and not the master of them, it is hereby declared to be the public policy of the State of Texas that all persons are, unless otherwise expressly provided by law at all times entitled to full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees. The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. To that end, the provisions of this Act shall be liberally construed with the view of carrying out the above declaration of public policy.

TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 1 (Vernon Supp. 1986).

The Act provides for public access to information retained by a "governmental body" as defined in section 2(1) of the Act. Section 2(1) defines a "governmental body" as:

(A) any board, commission, department, committee, institution, agency, or office within the executive or legislative branch of the state government, or which is created by either the executive or legislative branch of the state government and which is under the direction of one or more elected or appointed members;

(B) the commissioners court of each county and the city council or governing body of each city in the state;

(C) every deliberative body having rulemaking or quasijudicial power and classified as a department agency or political subdivision of a county or city;

(D) the board of trustees of every school district and every county board of school trustees and county board of education;

(E) the governing board of every special district;

(F) the part, section, or portion of every organization, corporation, commission, committee, institution, or agency which is supported in whole or in part by public funds, or which expends public funds. Public funds as used herein shall mean funds of the State of Texas or any governmental subdivision thereof.

(G) the Judiciary is not included within this definition.

Id. at § 2(1). Subdivision F provides the basis for the Plaintiffs' argument that the Defendants are governmental bodies within the meaning of the Act. Thus, the key issue in determining whether the Defendants are governmental bodies is whether they are supported in whole or in part by public funds, or whether they expend public funds. Subdivision F specifically defines public funds as "funds of the State of Texas or any governmental subdivision thereof." *Id.* This broad provision does not limit the definition of public funds to a particular source, i.e., tax revenues. In fact, under Texas law "public funds" include the State's money, property and contractual rights. *See Rhodes Drilling Co. v. Allred*, 70 S.W.2d 576, 581-82 (1934); *Gogans v. Simmons*, 319 S.W.2d 442, 445 (Tex. Civ. App.—Fort Worth 1958, writ ref'd n.r.e.); TEX. ATT'Y GEN.

OP. NO. MW-25;³ *see also Womack v. Womack*, 172 S.W.2d 307, 308 (Tex. 1943); The time and services provided by state employees constitute public funds. TEX. ATT'Y GEN. OP. NOS. JM-431 (1986), MW-373 (1981), MW-89 (1979), H-1309 (1978). The use of buildings or facilities that belong to the state constitutes receipt of public funds. TEX. ATT'Y GEN. OP. NO. MW-373. Even reimbursement of expenses for service on a committee constitutes receipt of public funds. TEX. ATT'Y GEN. ORD-273 (1981). The state-supported universities are agencies of the state whose funds belong to the State of Texas, i.e., are public funds. TEX. EDUC. CODE ANN. § 51.002 (Vernon 1972); *Walsh v. University of Texas*, 169 S.W.2d 993, 993-94 (Tex. Civ. App.—El Paso 1942, writ ref'd); *see also Lowe v. Texas Tech University*, 540 S.W.2d 297-98 (Tex. 1976) (*citing Walsh*, 169 S.W.2d 993); *Bache Halsey Stuart Shields, Inc. v. University of Houston*, 638 S.W.2d 920, 923-25 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.); *Lyons v. Texas A & M University*, 545 S.W.2d 56, 58 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.). *See Bd. of Regents of the University of Oklahoma v. NCAA*, 546 F. Supp. 1276, 1303 (W.D. Okla. 1982), *aff'd*, 468 U.S. 85 (1984). Funds generated by the athletic departments of State universities, characterized as auxiliary enterprise funds, are also public funds of the State of Texas. TEX. ATT'Y GEN. OP. NOS. D-1662 (1940), V-715 (1948), H-456 (1974).

Because an organization receives public funds does not necessarily mean that it is "supported in whole or in part

³ Section 7 of the Act charges the Attorney General with the obligation of interpreting the Act. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7 (Vernon Supp. 1986). Consequently, Texas courts have consistently accorded great, though not conclusive, weight to the General's opinions. *City of Houston v. Houston Chronicle Publishing Co.*, 673 F.2d 316 (Tex. Civ. App.—Houston [14th Dist.] 1984, no writ); *Smith v. McCoy*, 533 S.W.2d 457 (Tex. Civ. App.—Dallas 1976, writ dism'd).

by public funds," and is therefore subject to the terms of the Act. Private *persons* or businesses are not subject to the Act merely because they provide specific goods or services pursuant to a contract with a governmental body, TEX. ATT'Y GEN. ORD-302 (1982), ORD-228 (1979), ORD-1 (1973). If a contract imposes a specific and definite obligation on the private contractor to provide "a measurable amount of service in exchange for a certain amount of money as would be expected in a typical arms length contract for services between a vendor and purchaser . . .," the private contractor will not be subject to the Act. ORD-302 (1982). Further, the contract must contain no provision which either indicates a common purpose or objective between the purported governmental body and the public entity with which it contracts, or could be construed as constituting an agency-type relationship. TEX. ATT'Y GEN. ORD-228 (1979). Finally, it is apparent from transcripts of the House debates that private persons and entities were intended to come within the coverage of the Act as shown by the following passage:

REP. CLAYTON: Mr. Denton, I am concerned about Section 2 on page 10, where we are setting out there that part, section or portion of every organization, corporation, commission, committee, institution or agency which is supported in all or in part by public funds. What bothers me in this particular language, I'm thinking about [a] corporation. Say, for instance, if we were concerned with maybe STECK who does a lot of contract work for the State in printing matters. Would this bill subject them to throwing their records open to the public simply because a part of their support is due to state contracts?

REP. DENTON: This is the part I understand, and I certainly think there would be due concern but it would be only those records pertaining to that state contract. Expenditure of state funds,

public funds as used in this, shall mean the funds of the State of Texas: So I would only use the expenditure of that particular part.

REP. CLAYTON: Where do we see that at?

REP. DENTON: Line 13. This was added in subcommittee. The Amendment, Mr. Clayton, in H.B. 6 went to State Affairs Committee, did not include the Senate. Public Funds as used herein means the funds of the State of Texas. That was added by subcommittee.

Transcript of House Debates at 23-24; *accord* TEX. LEG. COUNCIL, Reform Legislation: *Text, Analysis and Forms* at 99 ("nearly every unit of government . . . as well as organizations which are not necessarily governmental, but are supported in whole or in part with public funds . . ." included in definition of "governmental body").

The contractor will be subject to the terms of the Act if *any* portion of the public funds paid to the contractor are paid for the general support of the contractor under *any* provision of the contract, and are not attributable to specific payment for specific measurable services. ORD-302 (1982), ORD-228 (1979).

VI. APPLICATION OF THE ACT TO THE NCAA

A. Extra-territorial Application

The NCAA argues the Act has no extra-territorial application. In *Marmon v. Mustang Aviation, Inc.*, 430 S.W.2d 182 (Tex. 1968), the Supreme Court held that the Texas Wrongful Death Statute had no extra-territorial jurisdiction. The Court based its decision on three factors: the statute expressed no such intent; Texas Courts had "repeatedly held that the statute had no extraterritorial effect;" and, despite such rulings from the Courts the legislature had re-enacted the statute a number of times with no amendment. *Id.* at 187. Thus, the Court concluded

that the legislature did not intend that the statute be given extra-territorial effect. In determining the territorial limits of the statute, the Court cited the following rule:

“Implied Territorial Limitations.—Unless the intention to have a statute operate beyond the limits of the state or country is *clearly expressed or indicated by its language, purpose, subject matter, or history*, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state or country enacting it. To the contrary, the presumption is that the statute is intended to have no extraterritorial effect, but to apply only within the territorial jurisdiction of the state or country enacting it, and it is generally so construed. An extraterritorial effect is not to be given statutes by implication. * * *”
(50 Am.Jur. 510. Statutes § 487).

Marmon, 430 S.W.2d at 187. (Emphasis added).

The cardinal rule of statutory construction is to determine the intent of the legislature and give effect to that intent. *Knight v. International Harvester Credit Corp.*, 627 S.W.2d 382, 384 (Tex. 1982). Legislative intent is determined by an analysis of the statute as a whole, rather than through scrutiny of isolated portions. *Taylor v. Fireman's & Policemen's Civil Service Commission*, 616 S.W.2d 187, 190 (Tex. 1981). If a statute is clear and unambiguous, extrinsic aids and rules of construction are inapplicable, and words shall be given their common, everyday meaning. *Cail v. Service Motor, Inc.*, 660 S.W.2d 814, 815 (Tex. 1983); *Minton v. Frank*, 545 S.W.2d 442, 445 (Tex. 1976). Finally, the Court should give the statute a reasonable construction to avoid injustice or an absurd result. *James*, 185 S.W.2d 966, 969 (Tex. 1945).

No provision of the Act expressly gives it extraterritorial application, nor have Texas courts ruled on the extraterritorial effect of the statute. The language, subject

matter and purpose of the Act, however, do evince a clear intent that the Act be given extraterritorial application. The Act is designed to guarantee to the citizens of the State of Texas "full and complete information regarding the affairs of government and the official acts of those who represent them as public officials and employees." TEX. REV. CIV. STAT. ANN. art. 6252-17(a), § 1 (Vernon Supp. 1986). The provisions of the Act are to be liberally construed so that the policy of the act may be carried out. *Id.* Section 2(1)(F) defines a governmental body as the part, section or portion of *every* organization . . . or agency which is supported in whole or in part by public funds, or which expends public funds. *Id.* (emphasis added). The word "every" means "each individual or part of a group without exception" WEBSTER'S NEW COLLEGIATE DICTIONARY 393 (1979). By using the word "every" the legislature evinced an intent to apply the Act to both in-state and out-of-state corporations or associations. The sole requirement under the Act is that the entity in question receive some support in the form of Texas public funds. If the particular entity falls within the definition of governmental body contained in the Act, its geographic location is irrelevant.

It would be illogical for the Court to find that the purpose of the Act is to ensure public access to information concerning the affairs of government, but then hold that the Act does not apply to foreign entities who fall within the definition of governmental body contained in the Act. Further, to end application of the Act at the State's borders would severely cripple the purpose of the Act. Those defined as governmental bodies under the Act could avoid its application by merely incorporating outside of the State's boundaries. The public would then be denied information concerning the expenditure or use of its funds despite the clear purpose of the Act.

B. Choice of Law

The NCAA next argues that Texas law does not apply to this case because choice of law principles preclude application of the Act to the NCAA.

When the Court exercises its pendent jurisdiction over Texas state law claims, it must apply Texas choice of law rules. *United Mineworkers v. Gibbs*, 383 U.S. 715, 726 (1966). Texas courts employ the "most significant relationship" test in all choice of law cases. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 421 (Tex. 1984); see *Gutierrez v. Collins*, 583 S.W.2d 312, 318-19 (Tex. 1979). The law of the state with the most significant relationship to the issue in this case will be applied to resolve the issue. *Duncan*, 665 S.W.2d at 421. The State of Texas has the most significant contacts in this case: the Plaintiffs are residents of Texas; eight of the nine members of the SWC are located in Texas; and the NCAA conducted a number of investigations which uncovered the information sought by Plaintiffs in Texas. Consequently, this Court is of the view that the law of Texas applies to this case.

C. Receipt of Public Funds

Plaintiffs argue that the NCAA receives public funds for its general support from Texas state-supported universities in three specific forms: dues payments; assessments against the universities' football television gross rights fees; and, costs, expenses and salaries absorbed by the universities when they host NCAA tournaments and championship meets, and when they allow state employees to work for the NCAA without reimbursement. First, the Court must determine whether the funds described above are "public funds;" if not, the inquiry ends. If they are public funds the Court must determine whether the NCAA's Bylaws and constitution impose a "specific and definite obligation" on the NCAA "to provide a measurable amount of service in exchange for a certain amount of money, i.e., the funds described above. If the NCAA

does not receive public funds for its general support it is not subject to the Act. TEX. ATT'Y GEN. ORD-228 (1979).

NCAA dues are paid from the auxiliary enterprise accounts of the state universities. The funds contained in these accounts belong to the State of Texas, i.e. are public funds. TEX. ATT'Y GEN. OP. NOS. 0-1662 (1940), V-715 (1948). NCAA Bylaw 9, section 3(a) states that annual dues are intended to cover the costs of "association publications, convention operations, establishment and maintenance of playing rules, and compilation of statistics." *Id.* These vague and amorphous provisions in no way impose a specific duty on the NCAA to return a measurable service in return for these funds. Rather, they are used to cover the general operating expenses. Attorney General Opinion JM-116 reached a similar conclusion. The Attorney General found that a state universities payment of annual membership dues to an intercollegiate athletic association were sufficient to subject the association to the Act. TEX. ATT'Y GEN. OP. JM-116 (1983). Similarly, this Court finds that the NCAA's receipt of annual dues payments from state-supported universities provides a basis for determining that the NCAA is a "governmental body" as defined by the Act.

NCAA Bylaw 8, section 2(c) provides for a 4% television gross rights fee assessment. The rights to televising games are owned by the member-universities who participate in that game. *See Board of Regents of University of Oklahoma v. National Collegiate Athletic Association*, 546 F. Supp. 1276, 1326 (W.D. Okla. 1982), *aff'd*, 468 U.S. 85 (1984). Football television rights and fees owned by state-supported universities are property of the state and become public funds. *Rhoades*, 70 S.W.2d at 576; *Goggan*, 319 S.W.2d at 445; *see Womack*, 172 S.W.2d at 308.

The NCAA argues pursuant to Bylaw 8-2(c) that it is contractually entitled to its share of the telecast revenues before any member university has arranged to have its

games televised. They argue that the university holds 4% of the gross rights fee in trust for the benefit of the NCAA; consequently, the 4% assessment does not constitute public funds. Revenues from television broadcasts are derived from contracts negotiated by the television networks and the universities, owner of the television rights. The NCAA has no contractual relationship with the television networks; the revenues the networks are obligated to pay are not owed to the NCAA. Merely because payment of a debt is to be calculated on the basis of a percentage of income derived by the obligor from a third party does not render the obligor a trustee, and does not change a purely contractual debt relationship into a trust. *McCord v. Fort Worth National Bank*, 275 S.W.2d 717, 719 (Tex. Civ. App.—Ft. Worth 1955, writ ref'd n.r.e.). Even if the NCAA were correct in its allegation of trust relationship, television revenues are still public funds. It is undisputed that in the first instance the television rights belong to the member universities. No matter how the NCAA has obtained its ownership interest in the funds, it has received public funds. The question then becomes whether the public funds were exchanged for a specific measurable amount of services.

Bylaw 8-2(c) states that the assessments fund the costs of "the NCAA postgraduate scholarship program and football-related services of the NCAA." The bylaw does not specify the amount, number of beneficiary of the scholarships or scholarship. Further, the bylaw does not indicate what constitutes a "football-related service." The 1981 Football Television Briefing Book, a publication of the NCAA, does indicate, however, that the assessment "funds the NCAA postgraduate scholarship program, football promotion, television administration, sports development and general administration" There is no evidence that the NCAA has changed this application of funds. It is clear that the assessments, like the dues revenues, are used for the general support of the NCAA and are not exchanged

for specific measurable services. The NCAA's receipt of the assessment provides another basis for determining that the NCAA is a "governmental body" as defined by the Act.

NCAA Executive Regulation One governs championship events and tournaments. The regulation authorizes reimbursement for some expenses but specifically prohibits reimbursement of the following:

1. On-campus facility rental charges;
2. The cost of permanent equipment;
3. Local transportation of competing teams;
4. Salaries of athletic department staff members who administer the tournament;
5. Salary of the institution's athletic director, who is on the game committee that supervises the athletic department staff in administering the event; and
6. Any costs that exceed the approved budget.

NCAA Regulation 1, §§ 2(e), 8(d)(1), 12. Because the costs outlined above are not reimbursed by the NCAA, they are necessarily paid with public funds by the state-supported university which has hosted the event. Accordingly, the public funds are necessarily expended in connection with the NCAA's tournaments and championship events. The NCAA gives nothing in exchange for these particular public funds. The Court is of the opinion that these funds are used for the general support of the NCAA, therefore the NCAA falls under the definition of governmental body and is subject to the Act.

Relying on the definition of "governmental body," the NCAA alleges that the Enforcement Division is that "part" of the Association which maintains the information sought by Plaintiffs. They argue that because this "part" of the

Association is not supported in whole or part by public funds, it is not subject to the terms of the Act and cannot be compelled to release the information. Their argument must fail for two reasons. The NCAA's interpretation of the definition would allow each and every entity, otherwise defined as a governmental body under the Act, to avoid application of the Act by establishing an independent source of funding for that portion of the entity which maintained its records. In light of the liberal construction which the Act must be given and the fact that this interpretation would effectively thwart the purpose of the Act, the Court must reject the NCAA's contention. Second, even if the NCAA were correct in its argument, it admits that the Enforcement Division is funded by championship events and tournaments. The Court has already determined that a portion of these revenues are public funds of the State of Texas.⁴ Consequently, the NCAA's argument must fail. Further, the Court would note that the NCAA comingles all sources of its revenue in a simple bank account. According to the testimony of the NCAA's Controller it would be difficult, if not impossible, for the NCAA to determine which revenue paid which expenditure. In fact, the Controller testified that the NCAA spent more on the items which the bylaws indicate will be supported with dues revenue, than was collected in dues revenue. Consequently, the Court is of the opinion that all

⁴ The Court would note that the definition of governmental body contained in the Act refers to entities "supported in whole or in part by public funds" The NCAA argues that the funds received from Texas state-supported universities are a minute percentage of their overall budget and do not contribute significantly to their overall budget. Given its plain, everyday meaning the word "part" denotes one of several subdivisions which together constitute a whole. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 828 (1979). Relying upon this definition the Court is of the opinion that any percentage, no matter how great or small, constitutes "support . . . in part" under the Act. Consequently, the amount of support contributed to the NCAA, or the SWC for that matter, is irrelevant to the Court's inquiry.

departments of the NCAA are supported in part by public funds of the State of Texas. The Court is of the opinion that the NCAA is a governmental body as defined by the Act for the reasons stated above.

Further, the Court is of the opinion that the information requested of the NCAA is public information. The Act defines public information as: "All information collected, assembled or maintained by governmental bodies pursuant to law or ordinance or in connection with the transaction of official business . . ." TEX. REV. CIV. STAT. ANN. art. 6252-17a § 3(a) (Vernon Supp. 1986). Clearly the records sought by the Plaintiffs were collected, assembled or maintained by the NCAA in connection with the transaction of the NCAA's official business. There is no support for the NCAA's contention that "official business" is limited to the authorized business of the State of Texas. This Court is of the opinion that the term "official business" includes the official business of any entity which falls under the definition of governmental body. *Industrial Foundation v. Texas Industrial Accident Board*, 540 S.W.2d 668, 676 (Tex. 1976); TEX. ATT'Y GEN. OP. NO. JM-116 (1983).

VII. APPLICATION OF THE ACT TO THE SWC

The SWC is a resident of Texas; therefore, there is no question of extraterritorial application or choice of law. The question, therefore, is whether the SWC received public funds. The testimony of the Commissioner of the SWC indicates that the Conference derives all of its income from the athletic events of its member schools, four of which are state-supported universities. The principle revenues of the SWC are derived from receipt of television gross rights fees assessments as provided in Article 9.04 of the Conference Bylaws. From 1981 through 1985, the SWC received in excess of four million dollars through application of this formula.

Once again, the first issue is whether the funds described are "public funds;" if not, the Court's inquiry ends. If they are public funds the Court must determine whether the SWC is under a "specific and definite obligation" to provide a measurable amount of service in exchange for a certain amount of money," i.e., the funds described above. If the funds are received for the general support of the SWC, the Conference is subject to the Act. TEX. ATTY GEN. ORD-228 (1979).

As noted earlier, football television rights are owned by the universities that participate in the game. 546 F. Supp. at 1326. The gross rights fees of state-supported universities are property of the State and become public funds. *Rhodes*, 70 S.W.2d at 576; *Goggan*, 319 S.W.2d at 445.

Clearly, the SWC received public funds. The Court must now determine whether the SWC receives the funds from its member state-supported universities for its general support or whether they are received in exchange for a specific measurable service. MW-308.

The SWC argues that it holds the funds as an agent-trustee for the benefit of the school and vice versa. The basis for their argument is that "an agency or trust relationship exists when one party collects or disburses money on behalf of another party." As was the case with the NCAA's trust argument, this argument must also fail. The Court is of the opinion that the obligation imposed upon the SWC member institutions by the SWC Bylaws amounts to a contractual obligation to convey a certain percentage of revenue received to the SWC.

The funds are not received by a member institution as an agent of the SWC and the member-universities do not stand in a position of trustee. Rather, the member institutions have a separate contractual obligation to the SWC dependent upon another contract. The fact that a percentage of revenue from one contract must in turn be paid to a third party does not create a trust under Texas law.

McCord, 275 S.W.2d at 719; see also *Frank v. Gaffney*, 2 S.W.2d 885, 886 (Tex. Civ. App.—Galveston 1928).

Next, the SWC argues that its receipt of these funds is merely a typical contract for services. In order to test this argument the Court must determine whether the agreement by which the funds are transferred imposes a specific and definite obligation on the SWC to provide a measurable amount of service in exchange for a certain amount of money, as would be expected in a typical arms-length transaction. TEX. ATT'Y GEN. ORDS. 228, 302. Further, the agreement pursuant to which the funds are paid must contain no provision which either indicates a common purpose or objective between the SWC and the state-supported universities, or could be construed as constituting an agency relationship. *Id.* ORD. 228.

The Constitution and Bylaws of the SWC pursuant to which the funds in question are transferred, contain no provision which imposes a specific or definite obligation on the Conference to provide a measurable amount of service in exchange for the funds. The Constitution and Bylaws speak only in general terms relating to the general support of the Conference. *E.g.*, SWC Bylaws art. XIX. Further, the Conference itself consists of university members. An agreement cannot be characterized as "at arms length" when a faculty representative agrees that his University should pay funds to an organization of which he is a governing member.

Moreover, it is clear that the SWC shares a similar common interest and objective with its state-supported university members. In fact, the Conference acts as an agent for the universities in some instances. In JM-116, the Attorney General applied the "common interest" test and determined that the Gulf Star Athletic Conference shared similar goals and objectives with its member universities and therefore did not pass the test developed in ORD-228. A comparison of the Gulf Star and SWC purpose clauses

indicates that their goals and objectives are virtually identical. *Compare* TEX. ATT'Y GEN. OP. NO. JM-116 *with* SWC CONST. Art. II.

Besides having a common purpose it is apparent that the funds paid to the SWC by the member universities are used to support the general operation of the Conference. The SWC Commissioner testified that the Conference percentage of television revenues was used to support the general operation of the Conference. It is clear, therefore, that the Conference receives state funds for its general support which are not paid as a result of a typical arms-length transaction.

The record further shows additional general support by state government for the Conference. The SWC is governed by a nine member board of faculty representatives. Each school provides one representative. The Conference Constitution required that the representative must either be on the faculty or have faculty status at a member institution. SWC CONST. art. VII. An Executive Committee oversees the day-to-day operations of the Conference and approves its budget. *Id.* art. X. The Committee presently consists of President Michael Johnson, faculty representative from the University of Houston, a state-supported school, Vice-President Bob Sweazy, faculty representative from Texas Tech, a state-supported school, Past President Edwin Horner, Baylor University, a private school, Frank Broyles, athletic director at the University of Arkansas, an out-of-state public school, and athletic director DeLoss Dodds of the University of Texas, a state-supported school. Neither the faculty representatives nor the Executive Committee members receive compensation from the SWC despite the fact that the SWC Commissioner characterized Mr. Johnson's conference duties as "substantial." Thus, four members of the governing board of the SWC must be Texas public employees. Three of the current members of the Executive Committee including the president and vice president are Texas public employ-

ees. Dr. Johnson, the President, has received added compensation from the University of Houston by the reduction of his teaching load to compensate him, in part, for his service as faculty representative to the SWC. In addition, the University of Houston has maintained an executive liability and indemnification policy covering Dr. Johnson's activities with the SWC. It is undisputed that these state employees support the work of the Conference. Use of state employees in this manner constitutes receipt of public funds under Texas law. TEX. ATT'Y GEN. OP. NOS. JM-431 (1986), MW-89 (1979), H-1309 (1978). Clearly, receipt of this form of public funds goes to the general support of the Conference.

The Court is of the opinion that the funds received by the SWC from state supported universities are public funds, and that the Act applies to the SWC by its express terms. Further, it is clear that the "state funds" received by the SWC are used for its general support.

Finally, the Court finds that the information sought by Plaintiffs was collected, assembled and maintained by the SWC in connection with the transaction of its official business. Consequently, the Court is of the view that the information is "public information." See TEX. REV. CIV. STAT. ANN. art. 6252-17a § 3(a) (Vernon Supp. 1986); *Industrial Foundation*, 540 S.W.2d at 676; TEX. ATT'Y GEN. OP. NO. JM-116.

VIII. SUMMARY

The Court is of the opinion that both Defendants are governmental bodies within the meaning of the Act, and that the information sought by Plaintiffs is public information within the meaning of the Act. Accordingly, the Court hereby Orders that the Defendants produce the information sought by the Plaintiffs to the Court, within twenty (20) days of the date of this Order, for an *in camera* inspection which will be conducted for the purpose of determining whether any of the exceptions listed in

section 3 of the Act prevent disclosure of the information sought. TEX. REV. CIV. STAT. ANN. art. 6252-17a, §§ 3, 7 & 8 (Vernon Supp. 1986).

Along with the information submitted for *in camera* review, the Court hereby Orders that the Defendants note within which exception each piece of information falls. Further, the Court will require that the Defendants file a brief setting out those cases, opinions or decisions which support their claims within twenty (20) days of the date of this Order. Plaintiffs will have ten (10) days from their receipt of Defendants' briefs to respond.

Further, the Court finds that the Plaintiffs have failed to establish that the Defendants acted under color of state law when they refused Plaintiffs' requests for information. Accordingly, the Court hereby enters Judgment in favor of the Defendants on Plaintiffs' claims brought under 42 U.S.C. section 1983.

SIGNED and ENTERED this 15th day of May, 1986.

/s/ JAMES R. NOWLIN

JAMES R. NOWLIN

UNITED STATES DISTRICT JUDGE

APPENDIX C

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

CIVIL NO. A-85-CA-616

**CAROLE KNEELAND and BELO BROADCASTING CORPORATION
vs.**

**NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and
SOUTHWEST ATHLETIC CONFERENCE**

ORDER

The above-styled and numbered cause came before the Court on July 24, 1986 for a non-jury trial.

BACKGROUND

This action was originally filed in state court on October 3, 1985, and removed to this Court by both Defendants on October 25, 1985. After a pre-trial conference held on February 6, 1986, the Court granted Defendant NCAA's Motion for Separate Trial on the issue of whether Defendants were governmental bodies as defined by the Act and the Plaintiffs' claims brought under 42 U.S.C. § 1983. A non-jury trial was held on March 6 and 7, 1986. On May 15, 1986, the Court entered a Memorandum Opinion and Order which denied the Plaintiffs' section 1983 claims, determined that both Defendants are governmental bodies within the meaning of the Act, and that the information sought by Plaintiffs is public information within the meaning of the Act. The Order directed that the Defendants produce the information sought by Plaintiffs

to the Court for an in-camera inspection within twenty days from the date of the Order so that the Court could determine whether any exemptions listed under section 3 of the Act prevented disclosure of the information sought. The Court further required that the Defendants file briefs concerning any exceptions to disclosure available under the Act.

On May 22, 1986, the Defendants filed a Joint Motion to Amend the Court's Order and to Certify an Immediate Appeal to the Circuit Court. On May 30, 1986, the Defendants filed a Motion for Additional Time to Comply with the Court's Order. On June 2, 1986, the Southwest Conference filed a Motion to Vacate the Court's Opinion and Dismiss the Pendent Claims, or in the Alternative, to Remand. On June 3, 1986, the Defendants moved for return of the documents following *in-camera* inspection and for conditional stay. The Court granted the Defendants' Motion for Extension of Time and ordered that the documents in issue be submitted to the Court on or before Friday, June 20, 1986, at 5:00 p.m. On June 16, 1986, the Court entered an order which denied the Defendants' Motion to Amend and to Certify an Immediate Appeal and for Stay. On that same day the NCAA filed its Notice of Appeal of the Court's Order of May 16, 1986. June 17, 1986 saw a great deal of activity in this case. The Court denied Defendant Southwest Athletic Conference's Motion to Vacate Opinion and Dismiss Pendent Claims, or in the Alternative, to Remand. In that Order, the Court noted that following removal of this ~~cause~~ neither Defendant had moved to dismiss the section 1983 claim and remand the state claims. Further, the Order noted that at the trial conducted by the Court the Defendants conceded that this Court had pendent jurisdiction over the Plaintiffs' state law claims. The Court also entered an order which denied the Defendants' Motion for Return of Documents following *in-camera* inspection but granted the motion insofar as it sought protection of the documents pending any appeal of

this Court's final order. Finally, the Court scheduled trial of any remaining issues in this case for Thursday, July 24, 1986. On that same day, June 17, 1986, the NCAA moved to stay proceedings in this action pending a decision on a petition for writ of mandamus which it had filed in the United States Court of Appeals for the Fifth Circuit. On June 19, 1986 the United States Court of Appeals for the Fifth Circuit denied the Defendants' petition; therefore, the Court denied the Motion to stay these proceedings as moot.

Pursuant to the Court's scheduling order of June 17, 1986, the parties, with the exception of the SWC, timely filed briefs concerning the remaining issues in this case. The SWC did not submit a brief to the Court.

I. REMAINING ISSUES

The NCAA asserts some thirty-six (36) defenses in its amended answers. The SWC asserted six (6) affirmative defenses in its amended answer, all of which are also asserted by the NCAA. The NCAA's brief on the remaining issues argues the following five (5) specific defenses:

1. Application of the Act would violate the First, Fifth and Fourteenth Amendments to the United States Constitution and similar provisions of the Texas Constitution.
2. The member institutions should be joined as necessary parties before the Court proceeds.
3. The Court should abstain.
4. The intervenors and Plaintiffs have failed to establish the necessary prerequisites to relief under the Act.
5. The NCAA has a privacy right in the information sought and the documents are protected by a self-critical analysis privilege.

II. FIRST, FIFTH AND FOURTEENTH AMENDMENT DEFENSES

The NCAA devotes a majority of its argument to allegations that application of the Act violates specific provisions of the United States and Texas Constitutions. Basically, the NCAA asserts three arguments in support of its contentions: First, extraterritorial application of the Act is an unconstitutional infringement by the State of Texas on the private affairs of a Kansas organization; second, the Act provides for an unconstitutional taking of the NCAA's property for private purposes; and, third, the Act infringes the NCAA's fundamental rights of privacy, association and academic freedom without furthering any compelling state interests.

A. Extraterritorial application

On May 15, 1986, this Court ruled that the Act was intended to have extraterritorial effect and that the Act applies to the NCAA. Nevertheless, the NCAA now argues that application of the Act to the NCAA is unconstitutional. In support of its position that the Texas Legislature cannot constitutionally regulate the affairs of a foreign association, the NCAA cites *Austin Building Co. v. National Union Fire Insurance Co.*, 432 S.W.2d 697 (Tex. 1968). In *Austin Building*, the Plaintiff, a Texas corporation, sued the Defendant insurance company for damages sustained in a fire in Kansas. The issue before the Court was one of choice of law. The Court found that the insurance contract in issue was made in Kansas with a Kansas citizen, would be performed in Kansas, related to property located in Kansas, and that the parties intended that Kansas law would apply. Therefore, the Court held that Kansas law would control interpretation of the contract under the doctrine of *lex loci*. *Id.* at 701. In the instant case, the statute in issue does not attempt to regulate contracts but rather ensures public access to information concerning the affairs of government and the

expenditure or use of State funds. Further, the NCAA has had significant, indeed the most significant, contacts with the State of Texas. The NCAA consistently enters Texas to conduct its business. It has conducted numerous investigations within the State of Texas, often employing Texas residents to conduct such investigations. The documents and information sought by Plaintiffs and Intervenor admittedly came to light pursuant to investigations conducted within the State by NCAA representatives. Finally, and most important, the NCAA receives and expends public funds of the State of Texas. These facts distinguish and render inapposite *Austin Building Co. v. National Union Fire Insurance Co. Id.* The Act was intended to have extraterritorial effect in pursuit of the clear and legitimate public policy stated in the Act.

If, as interpreted by the Plaintiffs, the NCAA argues that the full faith and credit clause of the United States Constitution bars extraterritorial application, the Court would note that the clause does not require application of another state's law in violation of Texas' own legitimate public policy. *Nevada v. Hall*, 440 U.S. 410, 422 (1979); *Pacific Employers Insurance Co. v. Industrial Accident Commission*, 306 U.S. 493, 501-02 (1939); *Garcia v. Total Oilfield Services, Inc.*, 703 S.W.2d 411, 414-15 (Tex. App.—Amarillo 1986, writ ref'd n.r.e.). If the NCAA argues that the full faith and credit clause demands application of Kansas law, it "assumes the burden of showing, upon some rational basis, that the conflicting interests . . . of the foreign state are superior to those of the forum." *Alaska Packers Association v. Industrial Accident Commission*, 294 U.S. 532, 547-48 (1935). When the public interest of the forum state in the persons, property or events subject in the litigation outweigh the interests of the foreign state, there is no denial of full faith and credit. *Id.* In this case, the NCAA has not even attempted to meet this burden. This litigation involves Texas residents, Texas state universities and student athletes, and a legitimate Texas pub-

lic policy. These factors clearly outweigh any policy Kansas might have to protect associations which do extensive business in Texas and receive and expend Texas public funds. Accordingly, the Court is of the opinion that extraterritorial application of the Act is constitutional.

B. Unconstitutional Taking

The NCAA argues that application of the Act results in an unconstitutional taking of private property for a private purpose in violation of the United States and Texas Constitutions. This argument ignores this Court's May 15, 1986 Order which found that the NCAA met the definition of governmental body under the Act and that the information requested under the Act is public information. The Court is not inclined to reconsider its prior determination; therefore, the NCAA's argument must fail because the information requested is not "private property," but rather public information. Moreover, the NCAA fails to explain how the Plaintiffs' and Intervenors' review of public information could possibly result in an unconstitutional "taking." The disclosure sought neither prevents the NCAA from using the information in issue nor diminishes some advantage which the NCAA holds over some competitions. The NCAA has simply failed to demonstrate that an unconstitutional taking would occur. This raises yet another point: a taking could not possibly occur until the Court reviews the information sought and determines which, if any, documents must be disclosed. To this extent, the NCAA's argument is premature.

Even if the Court presumed that a "taking" of "private property" occurred, the taking is for a legitimate public purpose and not for "private use." One person's property can be taken, even for the benefit of another private person, so long as there exists a justifying public purpose. *Hawaii Housing Authority v. Midviff*, 467 U.S. 229, 241 (1984). Once the Legislature has declared the "public interest," the Courts consider the declaration "well-nigh con-

clusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954). Thus, the public use requirement is considered conterminous with the state's public powers. *Hawaii Housing Authority*, 467 U.S. at 240. The Courts must defer to the Legislature's determination "until it is shown to involve an impossibility." *Old Dominion Co. v. United States*, 269 U.S. 55, 66 (1925). The express purpose of the Act sets forth a legitimate and vital public interest; disclosure of information concerning the affairs of governmental bodies and the expenditure and use of public funds. Specifically, the information sought in this action also concerns a legitimate public concern: athletic recruiting violations in Texas universities. As noted by the NCAA, "a fundamental purpose of the NCAA is to maintain 'intercollegiate athletics as an integral part of the education program.' *Justice v. National Collegiate Athletic Association*, 577 F. Supp. 356, 361 (D. Ariz. 1983)." In this Court's view, there is no more vital or legitimate public concern than the education of this State's citizens. The NCAA's "taking" argument is without merit.

C. Fundamental Rights

The NCAA next argues that its "fundamental rights" to privacy, freedom of association and academic freedom are violated by application of the Act and that the Plaintiffs must therefore demonstrate a compelling state interest which justifies the Act. The NCAA appears to assert a substantive due process argument which would require that the Plaintiffs demonstrate that the Act is necessary to promote a compelling State interest.

The first step in an analysis of the NCAA's claims is to determine the nature of the rights affected by the Act. The Court must apply strict scrutiny to a statute only when the legislation involves some suspect classification or touches upon some fundamental right. *Matthews v. Lucas*, 427 U.S. 495, 506 (1976); *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973). Where

no fundamental rights are affected, the statute need only rationally relate to some legitimate state interest. *Ohio Bureau of Unemployment Services v. Hodory*, 431 U.S. 471, 489 (1977); see *Pappanastos v. Board of Trustees*, 615 F.2d 219, 221 (1980). The NCAA's argument is based upon the premise that the NCAA itself enjoys the rights of privacy, association, and academic freedom. The Court is of the opinion that this premise is incorrect.

1. Privacy

All of the parties to this action concede that the NCAA has standing to assert a right of privacy on behalf of those individuals whom its files concern. *Industrial Foundation of South v. Industrial Accident Board*, 540 S.W.2d 668, 678 (Tex. 1968). The NCAA, however, goes one step further and argues that it has a constitutional right to privacy, essentially equivalent to individuals, which would bar application of the Act. Plaintiffs and Intervenor argue that the NCAA has no such privacy right.

The constitutional right to privacy is a developing concept which remains substantially undefined. *Whalen v. Roe*, 429 U.S. 589, 599 n.24 (1977). "The cases sometimes characterized as protecting 'privacy' have in fact involved two different kinds of interests. One is the individual interest in avoiding disclosure of personal matters, and another is the interest in independence in making certain kinds of decisions." *Id.* at 598-600; e.g., *Nixon v. Administration of General Services*, 433 U.S. 425, 457 (1977). Certainly, that line of cases recognizing the right to privacy in making certain kinds of decisions does not apply to the NCAA. *Bowers v. Hardwick, et al.*, 54 U.S.L.W. 4919, 4920 (U.S. June 30, 1986). This line of cases concerns matters of child rearing and education, family relationships, procreation, marriage, contraception and abortion. *Id.* Thus, the NCAA must find support for its argument in that line of cases which prevents disclosure of personal matters.

Assuming the NCAA's argument that corporations, like individuals, are accorded privacy protection under this line of cases, their privacy rights are not equivalent to those of an individual. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 779 n.14 (1978); *California Bankers Association v. Shultz*, 416 U.S. 21, 65-66 (1974); *Tavoularess v. Washington Post Co.*, 724 F.2d 1010, 1021-22 (D.C. Cir. 1984). The extent of a corporation's privacy interest is determined on a case-by-case basis by balancing the need for disclosure against the invasion occasioned by the disclosure. *Tavoularess*, 724 F.2d at 1023. Less severe intrusions will more likely result in disclosure. See *id.* Only rare cases involving disclosure of trade-secrets and confidential commercial information have required demonstration of a compelling interest before disclosure would be allowed. *Id.*

In arguing that its interests outweigh the need for disclosure, the NCAA argues that it would be irreparably harmed by disclosure in that its internal rules would be "emasculated" and that innocent third persons might be harmed by disclosure of unverified information. This must be balanced against the interest in disclosure: the public's interest in full and complete disclosure of information concerning the affairs of governmental bodies as defined by the Act.

First, the NCAA cannot assert possible harm to unrelated third parties in asserting its own privacy interest. It does have standing to raise such interests in claiming an exemption under the Act, *Industrial Foundation*, 540 S.W.2d at 678, but this is irrelevant to an assertion of its own privacy interest. Therefore, it must rely on its "emasculatation" argument to outweigh the need for disclosure. It is important to note what the NCAA does not argue. It does not assert, nor could it, that its association would collapse if disclosure is required. By its own admission it is "the only act in town" in its area of intercollegiate athletics. Thus, it cannot argue that some competitor will be advantaged by disclosure. Further, only one facet of

its organization, albeit an important facet, would suffer its grim prophesies of "emasculatation."

The Court is of the opinion that these possible effects are clearly outweighed by the public's right to information concerning organizations or associations which receive and expend public monies. This interest is heightened by the nature of the information sought. This Court is of the opinion that the public interest in the affairs of government and in education is important and fundamental. Further, the interest in disclosure of information from an association whose "fundamental purpose . . . is to maintain 'intercollegiate athletics as an integral part of the education program,' " NCAA Brief on Remaining Issues at 5, clearly outweighs the prospective harm disclosure might cause the Association. The Court is of the opinion that any privacy interest the NCAA might assert is clearly outweighed by the interests in disclosure.

2. Freedom of Association

In support of its somewhat vague argument that application of the Act infringes upon its constitutional right of association, the NCAA cites *NAACP v. Alabama*, 357 U.S. 449 (1958). In *NAACP*, the Court allowed the Plaintiff to assert the associational rights of its members but found no such inherent right in the NAACP itself. *Id.* at 459. The Court found that forced disclosure of the NAACP's membership lists furthered the Defendant's racially discriminatory scheme against the Plaintiff. *Id.* at 462. In reading this conclusion, the Court noted:

It is important to bear in mind that petitioner asserts no right to absolute immunity from state investigation and no right to disregard Alabama's laws. As shown by its substantial compliance with the production order, petitioner does not deny Alabama's right to obtain from it such information as the State desires concerning the purposes

of the association and its activities within the State.

Id. at 463-44 (emphasis added).

Under *NAACP v. Alabama*, the NCAA itself has no constitutional right to association. Even assuming that the NCAA has standing to assert the right of its members, there is absolutely no evidence or allegation that the Act furthers any sort of discriminatory scheme or affects the lawful exercise of fundamental civil rights. Moreover, the very language of *NAACP v. Alabama* quoted above, suggests that the constitutional right asserted by the NCAA would not protect it from disclosure of the information sought in this suit. The NCAA has failed to establish how application of the Act would or could deprive the NCAA of any freedom of association.

3. Academic Freedom

The NCAA argues that due process protects the educational process and academic freedom and that application of the Act would abridge this important right. Necessarily, the NCAA must claim the right of academic freedom in order to raise this argument, yet does not explain or even argue how this right protects it from disclosure of the information in issue.

Academic freedom has been recognized as a constitutional right implied by the First Amendment and reserved by the Ninth Amendment. See *Keyashian v. Board of Regents*, 385 U.S. 589, 603 (1967). Its parameters, however, are "ill-defined and the case law defining it is inconsistent." *Hillio v. Stephen F. Austin State University*, 665 F.2d 547, 553 (5th Cir. 1982). Basically, the right protects the educational process. See *id.*; see also *Keyashian*, 385 U.S. at 603; *NAACP v. Button*, 371 U.S. 415, 433 (1963).

The NCAA has failed to demonstrate or offer any direct authority for the proposition that it is an academic institution of any sort entitled to academic freedom. Moreover,

the NCAA has failed to demonstrate how the information sought falls within any constitutionally protected "educational process." The mere fact that the NCAA's members are educational institutions does not confer upon the NCAA the right to assert academic freedom as a constitutional defense in this case. A tangential relation to an academic institution does not confer this constitutional right on the NCAA. *In re Dinnan*, 661 F.2d 426, (5th Cir. 1981), *cert. denied*, 457 U.S. 1106 (1982).

In short, the NCAA has totally failed to establish that it may assert a constitutional right to academic freedom.

Accordingly, the Court is of the opinion that the NCAA cannot assert the fundamental rights of association and academic freedom. Further, if the NCAA enjoys some limited constitutional privacy interest, it is clearly outweighed by the interest in disclosure of the information sought, i.e., disclosure relates to a legitimate state interest.

III. JOINDER OF ADDITIONAL PARTIES

The NCAA argues for the first time that the member institutions which are the subject of the records sought claim an interest in those records and may be prejudiced if not joined in this action pursuant to Federal Rule of Civil Procedure 19. The NCAA acknowledges that two members of its organization have been denied intervention in this action. On February 20, 1986, this Court denied the Motion to Intervene of Rice University, and on February 7, 1986, this Court denied the Motion to Intervene of SMU. Because the present Defendants have standing to raise the defenses available to the member universities, *see Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 678 (Tex. 1976), the Court found that their interests were already adequately represented by the existing Defendants. *Bush v. Viterna*, 740 F.2d 350, 354 (5th Cir. 1984).

Rule 19(a) states:

A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

FED R. CIV. P. 19(a). "Under the present rule, pragmatic concerns, especially the effect on the parties and on the litigation, control a court's decision on joinder." *Smith v. State Farm Fire and Casualty Co.*, 633 F.2d 401, 405 (5th Cir. 1980); accord *Lone Star Industrial v. Redwine*, 757 F.2d 1544, 1551-52 (5th Cir. 1986). Further, "[a]n interest in disputed property does not make a party indispensable unless in his absence relief is impossible or the absent person is likely to be prejudiced or his absence will lead to multiple litigation." *Moreau v. Oppenheim*, 663 F.2d 1300, 1310 (5th Cir.), cert. denied, 458 U.S. 1107 (1981).

Clearly, complete relief can be accorded among those already parties to this action. The Court's decision regarding disclosure of information held by the NCAA and the SWC will not be affected by the absence of any other party. The Court's determination that the member universities are already adequately represented in this action necessitates a finding that they are not so situated that the disposition of this action in their absence will either impair or impede their ability to protect that interest. Moreover, the record is void of any evidence that non-joinder would leave any of the member universities subject to a substantial risk of incurring double, multiple, or oth-

erwise inconsistent obligations by reason of their claimed interest. FED. R. CIV. p. 19(a). The Court is of the opinion that the NCAA has failed to demonstrate any justification for joinder of additional parties at this time.

IV. ABSTENTION

The NCAA argues that this Court should abstain from ruling in this case "of first impression" because the case presents "unsettled" questions of state law and because the Court's interpretation of the Act brings the constitutionality of the Act into serious question.

Both Defendants removed this case from state court on October 25, 1985. The NCAA moved to dismiss this action for failure to state a claim on October 30, 1985; the motion was denied on November 11, 1985. Thereafter, the parties engaged in extensive and expedited pre-trial discovery, filed numerous motions and participated in a pre-trial conference with the Court. On motion of the NCAA, the Court bifurcated this action to determine, in the first instance, whether the Defendants were subject to the Act, whether the information sought was "public information," and for trial of those Plaintiffs' civil rights claim. The trial was held on March 6 and 7, 1986. Upon inquiry by the Court, both Defendants conceded that this Court had pendent jurisdiction to determine the state law claims. In fact, Defendant SWC expressed overwhelming confidence in the Court's ability to determine these now "complex and novel" issues. The Court entered its Memorandum Opinion and Order which determined these issues on May 15, 1986—and now, after almost nine months of litigation, the NCAA argues that the Court should abstain, apparently pursuant to *Railroad Commission v. Pullman*, 312 U.S. 496 (1941).

Abstention is an extraordinary and narrow doctrine to be used in rare circumstances. *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 813 (1976). In order to abstain under *Pullman*, "a federal court must find that the case presents a difficult, obscure, or

unsettled issue of state law, the resolution of which could eliminate or substantially narrow the scope of the federal constitutional issue." *Nissan Motor Corp. v. Harding*, 739 F.2d 1005, 1009 (5th Cir. 1984). Merely because the state courts have not interpreted a statute is not determinative; if the state law in question is clear, the federal court should exercise its jurisdiction. *Harman v. Forssenius*, 380 U.S. 528, 534-35 (1965).

First, the Court is of the view that this motion is untimely. Second, the Court is of the view that while this cause may be one of first impression, it does not present issues of state law which are so difficult, obscure or unsettled as to require abstention. Finally, the Court retained jurisdiction over the state claims, partially at the behest of the Defendants who removed the action to this Court. Under *United Mineworkers v. Gibbs*, 383 U.S. 715 (1966), the Court properly asserted jurisdiction over the pendent state claims because the federal claim was of sufficient substance to confer subject matter jurisdiction on this Court, and the state and federal claims clearly arose from a common nucleus of operative facts. *Id.* at 725. The state law claims have been fully litigated and are properly before this Court. In such cases

[p]rinciples of judicial economy, convenience, and fairness to the litigants suggest that a court should be reluctant to dismiss a pendent claim once substantial time and resources have been devoted to such claims and the court has heard the evidence and arguments on such issues. '[G]iven the advantages of economy and convenience and no unfairness to litigants, Gibbs contemplates adjudication of these claims.' *Brown v. Knox*, 547 F.2d 900, 903 (5th Cir. 1977), quoting *Hagans v. Lavine*, 415 U.S. 528, 545 (1974).

Caserta v. Village of Dickinson, 672 F.2d 431, 433 (5th Cir. 1982). This case is properly before this Court; the

Defendants' abstention argument, presented belatedly and with clear vision of hindsight, is meritless.

V. PLAINTIFFS' SATISFACTION OF PROCEDURAL PREREQUISITES

The NCAA contends that Intervenor A. H. Belo Corp., and David Eden and The Times Herald Printing Co. failed to request from the NCAA the information they seek before intervening in this suit. The NCAA concedes that Plaintiffs Kneeland and Belo Broadcasting Corp. complied with these procedural prerequisites. Further, the NCAA argues that it should now be given an opportunity to request an Attorney General's opinion pursuant to section 7.

Section 4 of the Act requires that an individual make application to inspect records at the offices of the custodian of records. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 4 (Vernon Supp. 1986). If the governmental body receives a request for information it believes to be exempt from disclosure, it may request an opinion of the Attorney General as to application of specific exemptions. *Id.* § 7. The governmental body must request the Attorney General's opinion within ten days of the application for inspection. If the governmental body refuses to seek an Attorney General's opinion, or to supply the requested information, the applicant may seek a writ of mandamus compelling disclosure.

The record reflects that Intervenor A. H. Belo Corp. intervened in the state action against the SWC only, on October 14, 1985. On November 8, 1985 A. H. Belo Corp. made a written request of the NCAA. On November 20, 1985, A. H. Belo Corp. amended its complaint to seek a mandamus against the NCAA. The amended complaint was filed more than ten days after A. H. Belo Corp. made its request of the NCAA; therefore, A. H. Belo Corp. complied with the procedural prerequisites of the Act.

The Times Herald Printing Co. and David Eden intervened in the state action on October 17, 1985. These Intervenorrs requested specific information from the NCAA on October 14, 1985. The Times Herald argues that it was not granted permission to intervene in the state proceedings until October 25, 1985, more than ten days after its written request. Under the Texas Rules of Civil Procedure any party may intervene in an action subject to being stricken by the Court upon motion. TEX. R. CIV. P. 60. Thus, it appears that The Times Herald became a party in the state action on October 17, 1986. This conclusion, however, does not compel a finding that The Times Herald has failed to satisfy the necessary procedural prerequisites to its action. Section 7(a) of the Act provides that upon receipt of a request under the Act "the governmental body within a reasonable time, no later than ten days" must request an Attorney General's opinion. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7. If the governmental body refuses to request an opinion, to supply the information requested, or to release, or to release information declared public by the Attorney General, the person requesting the information may seek a writ of mandamus compelling disclosure. *Id.* § 8. The Act states that the governmental body shall seek an Attorney General's opinion within a reasonable time; it does not necessarily require that the governmental body have ten days to seek an opinion. *Id.*, § 7. Even if The Times Herald sought mandamus only three days after making its request, the Court is of the opinion that the NCAA had a reasonable amount of time to seek an Attorney General's opinion in light of the circumstances of this case. The record reflects that Plaintiff Kneeland made her request of the NCAA four months prior to seeking mandamus; the NCAA never sought an Attorney General's opinion during that period. Intervenor A. H. Belo Corp. waited in excess of ten days after its request was made before seeking mandamus; again, the NCAA made no attempt to obtain an Attorney General's

opinion. All of the requests sought substantially similar information. Under these facts, it is clear that the NCAA never intended to request an Attorney General's opinion. In fact, it has been the NCAA's position that it need not seek such an opinion. The Court, therefore, is of the opinion that the NCAA was allowed a reasonable time in which to seek an Attorney General's opinion before Intervenor Times Herald joined the state action.

The NCAA's assertion that it should now be allowed to seek an Attorney General's opinion as to whether it is a governmental body is equally meritless. Section 8 states that if a governmental body refuses to request an Attorney General's opinion, or to provide the information requested, the party who made the request may seek a writ of mandamus. The record clearly establishes that this scenario occurred and that the Plaintiffs and Intervenor properly sought a writ of mandamus pursuant to section 8. It would strain reason and be an unseemly waste of time, effort and resources of all of the parties to allow the NCAA to now seek an Attorney General's opinion.

Accordingly, the Court is of the view that the Plaintiffs and the Intervenor have met the necessary statutory prerequisites to filing this action, and that the NCAA is not entitled to seek an Attorney General's opinion at this late date.

VI. VALIDITY OF THE ACT UNDER ARTICLE II AND V OF THE TEXAS CONSTITUTION

Both Defendants allege without argument or authority that the Act violates Article II of the Texas Constitution in that it "purports to bestow judicial powers and authority upon the Attorney General who is a member of the executive branch of Government," as well as Article V, section I of the Texas Constitution in that it "purports to bestow judicial powers and authority in an entity other than one of the Courts specified in the Texas Constitution." Apparently, both purported violations arise from

section 7's requirement that the Attorney General render decisions concerning application of the exceptions set out in section 3 of the Act.

The Court must presume the constitutionality of an act of the Legislature. *Texas Public Building Authority v. Mattox*, 686 S.W.2d 924, 927 (Tex. 1985); *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968). Therefore, the burden is on the party attacking the statute as unconstitutional. *Texas Public Building Authority*, 686 S.W.2d at 922 (citing *Robinson v. Hill*, 507 S.W.2d 521, 524 (Tex. 1974)). The Court will declare a statute unconstitutional only when it is prohibited by a specific provision of the Constitution, "or such is clearly implied." *Id.* at 927. The separation of powers provisions of the Texas Constitution are violated "when the [function] of the judicial process in a field constitutionally committed to the control of the courts is interfered with by the executive or legislative branches" *State Board of Insurance v. Betts*, 308 S.W.2d 846, 851-52 (Tex. 1958) (Norvell, J.); accord *Coates v. Windham*, 613 S.W.2d 572, 576 (Tex. Civ. App.—Austin 1981, no writ).

Section 7 of the Act provides that, upon request of a governmental body, the Attorney General shall issue an opinion as to whether the information requested must be disclosed. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7 (Vernon Supp. 1986). Article 4, section 22 of the Texas Constitution authorizes issuance of such opinions. Section 22 reads, in pertinent part, that the Attorney General "shall . . . give legal advice in writing to the Governor and other executive officers, when requested by them, and perform other such duties as may be required by law." TEX. CONST. art. IV, § 22. The interpretive commentary which follows this provision of the Constitution states: "The Attorney General . . . performs two principal functions: 1. the giving of legal advice in the form of opinions to the Governor, heads of departments and state institutions, committees of the Legislature, and county authorities; . . ." TEX. CONST. art. IV, § 22, interp. commentary (Vernon

1984). Further, article 4399 requires that the Attorney General render written opinions to certain individuals about questions which affect the public interest. TEX. REV. CIV. STAT. ANN. art. 4399 (Vernon Supp. 1986). Therefore, the Attorney General is authorized to issue opinions by constitutional and statutory authority. TEX. CONST. art. IV, § 22; *Plainview Independent School District v. Edmonson Wheat Growers, Inc.*, 681 S.W.2d 299, 302 (Tex. App.—Amarillo 1984, writ ref'd n.r.e.). Opinions of the Attorney General are not conclusive determinations of the law, but rather persuasive opinions. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316 (Tex. Civ. App.—Houston [14th Dist.] 1984, no writ). The Attorney General has no authority to enforce his opinions; they are merely advisory. See *Guerra v. McClellan*, 250 S.W.2d 241, 243 (Tex. Civ. App.—San Antonio 1952), *aff'd*, 258 S.W.2d 72 (1953). This fact was obviously recognized by the legislature when it provided that a governmental body which refused to comply with an Attorney General's opinion would be subject to a writ of mandamus. TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 8 (Vernon Supp. 1986).

The opinions of Texas Courts are obviously binding and enforceable, TEX. CONST. Art. V; § 1, however, they may not issue advisory opinions. *Id.* Art. II, § 1; *Employees Retirement System v. McDonald*, 551 S.W.2d 534, 536 (Tex. Civ. App.—Austin 1977, writ ref'd). The Act requires that the Attorney General issue advisory opinions which are authorized by constitutional and statutory authority. The Texas judiciary is precluded from issuing such opinions. The Act does not grant judicial authority to the Attorney General, and therefore, does not violate article II or article V of the Texas Constitution.

VII. OTHER DEFENSES

The NCAA's answers contain the following defenses which have not been addressed in this order or the Court's

May 15, 1986 Memorandum Opinion: waiver; preemption; abrogation of the contracts and privileges and immunities clauses of the United States Constitution; the privilege of self-critical analysis; and violations of the clean hands and good faith doctrines. None of these defenses has been extensively briefed or argued. There is absolutely no evidence that the Plaintiffs or Intervenors waived any rights they have under the Act. Likewise, there is no evidence which supports the NCAA's claim that the Act is preempted by some unspecified federal statute, or that application of the Act will interfere with its constitutional right to contract or abridge its rights under the privileges and immunities clause. Therefore, the Court is of the opinion that these defenses will not bar application of the Act.

Because this action seeks mandamus, an equitable remedy, the NCAA alleges that the Plaintiffs and Intervenors have not acted in "good will" and do not have "clean hands." *Industrial Foundation*, 540 S.W.2d at 674. In Open Records Act cases, however, these equitable defenses are given no weight because "[t]he legislative intent of making public information available to *any person* would be thwarted if a court were allowed to consider the requestor's motives even though the custodian may not due so." *Id.* at 674 n.5. These defenses are not applicable to this action.

Finally, the NCAA asserts a privilege of self-critical analysis as a bar to application of the Act. This privilege protects against disclosure of records generated as a result of internal investigation. See *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973); Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083 (1983). The NCAA suggests that the privilege shields disclosure when the information results from a critical self-analysis undertaken by the party seeking protection, the public has a strong interest in preserving the free flow of the information sought, and discovery of the information would curtail its flow. NCAA

Brief in Support of Exceptions at 20. The NCAA has offered no authority from this circuit which specifically recognizes this privilege. *In re LTV Securities Litigation*, 89 F.R.D. 595, 614-18 (N.D. Tex. 1981) is cited as support for recognition of the privilege; however, that case is squarely grounded upon an analysis of the attorney-client and work product privileges. Moreover, even if the Court were persuaded that such an amorphous privilege existed in this Circuit and that it might apply to bar application of the Act, the NCAA has not established the criteria it cites for application of the privilege. In this case the "self-critical analysis" was done by the schools themselves or was a product of the NCAA investigating the schools. It was not a product of the NCAA investigating itself. Further, the Court would find it difficult to declare that the public had an interest in maintaining the confidential flow of this information. The Court is of the view that the privilege of "self-critical analysis," if any, is not a constitutional bar to disclosure of this information.

VIII. CONCLUSION

Accordingly, the Court is of the opinion that the Defendants have failed to establish any defense which will bar disclosure of the information sought. The Court expresses no opinion as to the exceptions claimed by the Defendants under the Act, but will issue a separate opinion on those claims.

SIGNED and ENTERED this 18th day of August, 1986.

/s/ JAMES R. NOWLIN

JAMES R. NOWLIN

UNITED STATES DISTRICT JUDGE

APPENDIX D

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

CIVIL NO. A-85-CA-616

CAROLE KNEELAND and BELO BROADCASTING CORPORATION,
vs.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION and
SOUTHWEST ATHLETIC CONFERENCE,

FILED
MAY 4, 1986

MEMORANDUM OPINION AND ORDER

I. BACKGROUND

On May 15, 1986 this Court entered a Memorandum Opinion and Order which determined, among other things, that the Defendants in this action were governmental bodies for purposes of the Texas Open Records Act (the Act), and that the information sought by Plaintiffs and Intervenor is public information. Thereafter, the Defendants produced the information sought for an *in-camera* inspection and claimed that virtually all of the information is exempt from disclosure under the exceptions set forth in section 3(a) of the Act. On July 24, 1986, the remaining issues and defenses were tried to the Court. In a Memorandum Opinion and Order filed on August 18, 1986, the Court overruled the defenses asserted by Defendants. The final task before the Court is to determine whether any of the exceptions asserted by the Defendants preclude disclosure of the information sought by Plaintiffs and Intervenor.

II. THE BURDEN

In making this final determination, the Court must first inquire into what burden is necessary to establish an exception and upon whom that burden rests. The key to such inquiry in this case lies in an analysis of section 7 of the Act which recites:

(a) If a governmental body receives a written request for information which it considers within one of the exceptions stated in Section of this Act, but there has been no previous determination that it falls within one of the exceptions, the governmental body within a reasonable time, no later than ten days, after receiving a written request must request a decision from the attorney general to determine whether the information is within the exception. If a decision is not so requested, the information shall be presumed to be public information.

(b) The attorney general shall forthwith render a decision, consistent with standards of due process, to determine whether the requested information is a public record or within one of the above stated exceptions. The specific information requested shall be supplied to the attorney general but shall not be disclosed until a final determination has been made. The attorney general shall issue a written opinion based upon the determination made on the request.

TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 7 (Vernon Supp. 1986). Plaintiffs and Intervenors argue that because the Defendants failed to seek an attorney general's opinion the presumption set out in section 7(a) is applicable. Defendant SWC points out that section 7 provides no specific direction to an entity which contests its status as a governmental body, and therefore argues that the presumption is inapplicable. Defendant NCAA takes no firm

position on application of the section 7 presumption, but rather argues that any presumption created is rebuttable and not conclusive.

Resolution of this issue is, at best, difficult. Indeed, the Act provides no specific direction to an organization which contests its status as a governmental body. The SWC's argument that it is unjust to apply the presumption to an organization that "has an honest and good faith belief that it is not subject to TORA" is at first blush somewhat appealing. Further analysis, however, diminishes the argument.

The Legislature obviously intended that the Attorney General initially decide whether information sought from a governmental body falls within an exception to disclosure. Section 7 does not allow a requestor to seek an Attorney General's opinion. *Id.* § 7. If the governmental body refuses to request an Attorney General's opinion, the information is presumed to be public and the requestor may seek a writ of mandamus which compels disclosure if the information is not released. *Id.* §§ 7(a), 8. The Legislature obviously placed the presumption in the Act as a means of forcing governmental bodies to seek the opinion of the state Attorney General.

Adoption of the SWC's argument could effectively eliminate the role of the Attorney General in the Act. Under its argument any organization could assert an "honest" belief that it is not a governmental body under the Act, refuse to request an Attorney General's opinion and force the requestor to seek mandamus in district court without benefit of the presumption. The SWC has cited no authority which supports its argument nor has any authority been found by the Court. A careful review of Attorney General Opinions and Open Records Decisions demonstrates that from the inception of the Act, the Attorney General has determined whether entities or organizations are governmental bodies. *E.g.*, OP. TEX. ATT'Y GEN.

NOS. H-554 (1975), H-450 (1974); ORD-228 (1979), ORD-1 (1973). It is clear from reading Attorney General Opinions and Open Records Decisions that the threshold issue the Attorney General must determine is whether the body from whom information is sought is a governmental body. Both logic and precedent dictate that the Attorney General is authorized to make this determination. Further, there is no authority for the proposition that the Attorney General is not authorized to make this determination. Thus, when an organization contests its status as a governmental body and refuses to seek an Attorney General Opinion, a later determination at a mandamus action brought pursuant to section 8 that the organization is a governmental body raises the presumption that the information sought is public.¹

Intervenor Times Herald Printing Company argues that the Legislature intended the presumption of Section 7(a) to be conclusive. The applicable authorities do not support this proposition. Texas courts have consistently allowed a governmental body which failed to make a proper section 7(a) request the opportunity to rebut the presumption. *City of Houston v. Houston Chronicle Publishing Co.*, 673 S.W.2d 316, 324 (Tex. App.—Houston [1st Dist.] 1984, no writ); *Hutchins v. Texas Rehabilitation Comm'n.*, 544 S.W.2d 802, 803 (Tex. Civ. App.—Austin 1976, no writ). Open Records Decision 319 clearly sets out the burden necessary to overcome the presumption: “[T]his presumption could be overcome by a compelling demonstration that the requested

¹ In light of the authority cited in the Court’s opinion of May 15, 1986, it is at least curious that the SWC would argue that it had a “honest and good faith belief” that it was not a governmental body under the Act. The Court is of the opinion that the SWC falls squarely within the definition of governmental body and that the applicable authority supports that determination. The Court makes no comment on whether the NCAA had an “honest and good faith belief” that it was not a governmental body as the NCAA does not argue application of the presumption, but rather the effect of the presumption.

information should not be made public." TEX. ATT'Y GEN. ORD-319 (1982); *e.g.*, TEX. ATT'Y GEN. ORD-26 (1974). Accordingly, the information sought is presumed to be public information; the presumption may be overcome by the Defendants only by a compelling demonstration that the information sought by Plaintiffs and Intervenors should not be released.

III. EXEMPTIONS

Pursuant to the Court's Order of May 15, 1986, Defendants filed a list of exceptions that, they argue, apply to the subject documents. The Defendants assert no exception is applicable to certain documents. The Court hereby Orders that those documents be disclosed. Further, the SWC asserts that several documents relate to on-going investigations. The records submitted by the NCAA apparently relate to completed investigations. Only that information which relates to completed investigations is public and must be disclosed. *See* TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 6(1) (Vernon Supp. 1986).

Defendant NCAA argues that virtually every document falls within one of the following exceptions: 3(a)(1), information deemed confidential by law, within constitutional, statutory, or by judicial decision; 3(a)(11), inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than one in litigation with the agency; 3(a)(14), student records at educational institutions; and education records exempt from disclosure under section 14(e). Likewise, Defendant SWC argues that the vast majority of the documents submitted for *in-camera* inspection fall within the following exceptions: 3(a)(1); 3(a)(8), records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime; 3(a)(11); and section 14(e).

The Defendants, as custodians of the information sought by Plaintiffs and Intervenors, may assert any of the exceptions necessary to protect their interests as well as

those of third parties not associated with them. *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 678 (Tex. 1976), *cert. denied*, 430 U.S. 391 (1977); *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 548 (Tex. App.—Austin 1983, writ ref'd n.r.e.). The Court will discuss the applicability of each exception asserted and then specifically rule on the applicability of the exceptions asserted.

A) Section 3(a)(1); Confidential Information

Section 3(a)(1) exempts from disclosure "information deemed confidential by law, either Constitutional, statutory or by judicial decision." TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(1) (Vernon Supp. 1986). The NCAA asserts that it is entitled to withhold disclosure of the documents sought based upon the federal constitutional right to privacy. Both Defendants argue that the information sought is protected by the state common law right to privacy.

1) Constitutional Right to Privacy

The NCAA first argues that the information given them by various individuals was conveyed under a pledge of confidentiality and is therefore entitled to constitutional protection. This is clearly a factor to be considered when the Court balances the interests of Plaintiffs, Intervenors and Defendants, but it is not by any means a conclusive factor. *See Robles v. Environmental Protection Agency*, 484 F.2d 843 (4th Cir. 1973) (FOIA case); *Fadjo*, 633 F.2d at 1176. Such promises may likewise be considered under Texas law. Promises of confidentiality will not prevent disclosure of information under the Act, unless they are specifically authorized by law. OP. TEX. ATT'Y GEN. H-258 (1974); ORD-554 (1975).

Next, the NCAA argues that because the information contains private, embarrassing facts it deserves constitutional protection. The United States Constitution prohibits

governmental intrusion into an individual's private affairs. See *Whalen v. Roe*, 429 U.S. 589, 598-602 (1977); *Paul v. Davis*, 424 U.S. 693, 713 (1976); *Ramie v. City of Hedwig Village*, 765 F.2d 490, 492 (5th Cir. 1985); *Fadjo v. Coon*, 633 F.2d 1172, 1175-77 (5th Cir. 1981). The right to privacy consists of two interrelated strands: the individual's right to avoid disclosure of personal matters and the individual's interest in independence in making certain important decisions. *Fadjo*, 633 F.2d at 1175 (quoting *Whalen*, 429 U.S. at 599-600). "Both strands may be understood as aspects of the protection which the privacy right affords to individual autonomy and identity. [The disclosural] strand, however, described by this circuit as 'the right to confidentiality,' is broader in some respects." *Fadjo*, 633 F.2d at 1175 (citations omitted). The decision-making strand of the privacy right is narrow and concerns matters such as "marriage, procreation, contraception, family relationships, and child rearing and education." *Whalen*, 429 U.S. at 600, n.26 (quoting *Paul*, 424 U.S. at 713); e.g., *Eowers v. Hardwick*, No. 85-140 (June 30, 1986). The disclosural strand is broader and includes matters which fall outside the decision-making strand yet implicate the individual's interest in nondisclosure. See e.g., *Nixon v. Administration of General Services*, 433 U.S. 425, 455 (1977) (disclosure of personal information and personal finances); *DuPlantier v. United States*, 606 F.2d 654, 669-71 (5th Cir. 1979) (financial disclosure within scope of disclosural strand); *Plante v. Gonzalez*, 575 F.2d 1119, 1132 (5th Cir. 1978) (financial disclosures). While this strand is broader, "the privacy interest [which it protects]" is weaker than that found wanting in *Whalen v. Roe*" *Nixon*, 433 U.S. at 458.

The NCAA claims that virtually *all* of the information sought by Plaintiffs and Intervenor contains private facts about third parties, and by extension, private facts about the NCAA which cannot be inquired into or disclosed pursuant to state law absent some legitimate and proper gov-

ernmental concern. The Court's *in-camera* review of the information sought confirms that it contains large amounts of personal and financial information concerning students, student-athletes, university employees, university alumni, as well as other private individuals. The Court must determine whether the invasion of privacy inherent in disclosure of this information outweighs any *legitimate interest* asserted by Plaintiffs and Intervenor through the Act. *Whalen*, 429 U.S. at 492; *Fadjo*, 633 F.2d at 1176; *Plante*, 575 F.2d at 1134 (more than mere rationality must be demonstrated). In this regard, the NCAA will establish a "compelling demonstration" and meet its burden if it demonstrates that the legitimate public interest is outweighed by the interest it asserts. See TEX. ATT'Y GEN. ORD-71 (1975).

2) Legitimate Public Interest v. Interesting Information

The Plaintiffs and Intervenor characterize the Defendants as organizations that demonstrate an "arrogant attitude" that the public has no legitimate interest in their regulation of intercollegiate recruiting practices. The Defendants characterize Plaintiffs and Intervenor as a sensationalistic and unscrupulous press interested only in "selling newspapers" with no real concern about the best interest of the public or intercollegiate athletics. They allege Plaintiffs seek only information which the public finds curious or interesting, not information which must be disclosed because of a legitimate public interest or concern. Somewhere between these polarized views lies the real intent of each party; an intent which this Court cannot and will not divine; first, because it is not particularly relevant to these proceedings, and second, because it is most likely impossible to conclusively determine. The fact that there now exists a "nationwide scandal" engulfing intercollegiate recruiting practices and that the public has a legitimate, indeed compelling, interest in that controversy need not be divined; both are readily apparent.

The nationwide concern over intercollegiate athletics extends well beyond scandals in recruiting. The public controversy and concern essentially involves the proper role of athletics at our universities and the adequate education of our nation's young people. The Court is of the firm belief that education is the cornerstone upon which the future of this country rests. The public can have no more legitimate concern than a concern for the proper education of its younger people. The actions of an organization or association whose "fundamental purpose . . . is to maintain intercollegiate athletics as an integral part of the education program," NCAA Brief on Remaining Issues at 5, necessarily affects education and the educational process. The public, then, necessarily has some interest in the activities of that organization. When that organization is "the only act in town" ultimately responsible for enforcement of rules and imposition of sanctions against public and private educational institutions, the public interest in the activities of that organization increases almost exponentially. There is no question that the public has a legitimate and vital concern about education, the role of athletics in education, and specifically the nationwide scandal involving recruiting violations.²

The record contains substantial evidence to support this Court's determination that recruiting violations are matters of substantial public concern. Congress has investigated recruiting violations. Indeed, members of the NCAA Enforcement Committee have been called before Congress to testify about enforcement proceedings. *NCAA Enforcement Program: Hearings Before the Subcommittee on Ov-*

² One need go no further than the State of Texas to find an example of the public's concern about education and the role of athletics in education. Recently, the role of athletics and other extracurricular activities became paramount to the basic educational needs of our children. The public concern and outcry became so great that the Texas Legislature responded by enacting the so-called "no pass, no play rule." TEX. EDUC. CODE ANN. § 21.920 (Vernon 1984).

ersight and Investigation of the House Committee on Interstate and Foreign Commerce, 95th Cong., 2d Sess. (1978). This Court has taken notice of numerous articles and publications which address the subject. *E.g.*, Gaona, *The National Collegiate Athletic Association: Fundamental Fairness and the Enforcement Program*, 23 ARIZ. L. REV. 167 (1983); Remington, *NCAA Enforcement Procedures Including the Role of the Committee on Infractions*, 10 J.C. & UNIV. LAW 181 (1983); Comment, *Compensation for Collegiate Athletes: A Run for More than the Roses*, 22 SAN DIEGO LAW REV. 701 (1985); J. Michener, *Sports in America* 183-333 (1976).

Moreover, the controversy has been recognized by at least one other court. *Barry v. Time, Inc.*, 584 F. Supp. 1110 (N.D. Ca. 1984). In that suit, Plaintiff brought a libel action against Time, Inc. Under *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court was required to determine whether the controversy in issue was a "public controversy." *Id.* at 1115. The Court found that the concern over the role of athletics in our universities was not simply a matter of interest to the public, but rather was a "real dispute, the outcome of which affects the general public or some segment of it in an appreciable way." *Barry*, 584 F. Supp. at 1116-17 (quoting *Waldbaum v. Fairchild Publications, Inc.*, 627 F.2d 1287 (D.C. Cir.), *cert. denied*, 449 U.S. 898 (1980)). As Judge Patel aptly stated:

Furthermore, this controversy must be viewed in the context of the larger public debate over the proper role of athletic programs at institutions of higher learning. For many years, critics of bigtime collegiate athletics have commented on what they perceived to be the incongruity of a "win at all costs" attitude and the concomitant infractions of NCAA rules such an attitude engenders at educational institutions, which are at the same time attempting to instill some sense

of civic virtue in their students. Conversely, supporters of major collegiate athletic programs have noted that such programs provide an opportunity for student-athletes to obtain an education which might otherwise be unavailable to them, while at the same time boosting school morale and providing needed revenues.

Id. at 1116-17 (footnote omitted).

Against these public concerns, the Court must weigh the privacy interest of the NCAA and the individuals from or about whom information was collected by the NCAA.

The Court has already determined that the NCAA's privacy interest, to the extent that it exists, does not outweigh the public interest and the need for disclosure in this case. *Kneeland et al. v. NCAA, et al.*, No. A-85-CA-616, slip op. at 10-12 (W.D. Tex. Aug. 18, 1986). The Court must next determine whether the privacy interests of certain individuals, as asserted by the NCAA, outweigh the public interest and prevent disclosure. The documents submitted for *in-camera* inspection contain financial information, allegations of misconduct and responses thereto, as well as other information which would doubtless be characterized as private, intimate or embarrassing by the individuals who are the subject of the information. Basically, the information concerns four (4) groups of individuals: students and their families; coaches, staff and university employees; alumni or "boosters;" and sources of information or "informers." In balancing the interests of all parties, the best resolution to this dispute requires a judgment which protects the privacy interests asserted and satisfies the legitimate interests of the public in disclosure of the information as asserted by the Plaintiffs and Intervenor through the Act. *See Industrial Foundation*, 504 S.W.2d at 686.

The information submitted for *in-camera* inspection contains voluminous personal, financial and biographical data

about prospective student-athletes, student-athletes, and their families. The vast majority of the student-athletes or prospective student-athletes named in the NCAA investigation files are persons who were the subjects of recruiting violations, not the perpetrators of violations or individuals who sought improper recruitment incentives. The Plaintiffs and Intervenor do not state any legitimate interest in discovering the identities of these persons, much less their personal, financial, or biographical data. Disclosure of improper activity or recruiting practices, on the other hand, will necessarily aid the general public, parents, athletes, coaches, teachers, counselors, recruiters, alumni and boosters in understanding specific violations and preventing violations and illegal practices before they are consummated. The Court can perceive no legitimate public interest in disclosure of the identity or personal data of students or their families. Consequently, the Court will Order that the names of all students, student-athletes, prospective student-athletes, as well as the names of their family members, be redacted from the information ordered disclosed by this Court. In addition, all transcripts, phone numbers, bank account numbers, social security numbers, student numbers, geographical and biographical data which tend to identify any student, student-athlete, prospective student-athlete or any member of their family shall be redacted from the information ordered disclosed by this Court. The Court would note that it is sorely tempted to order the release of the names of those students who solicited improper recruitment and especially the names of parents and family members who solicited improper recruitment. Those who seek to purposefully profit from a corrupt system are themselves corrupt and their actions are despicable. It is especially disheartening to read of parents who use their children's skills solely for the parents' economic gain and at great and lasting cost to their children. The Court, however, is of the opinion that exposure of these pathetic activities would only cause greater

harm to those the Court, and presumably all parties, seek to protect—the student athlete.

The public's legitimate interest in the information about the other specified group members' involvement in recruiting violations is much more apparent. High school and college coaches, staff members and employees often have the most direct contact with student athletes, prospective student-athletes, recruiters and parents. They often have the best overall picture of the recruiting process. Generally, they are either the parties who commit recruiting violations or the first to be aware that violations have occurred. Likewise, alumni and "boosters" are often the first to know about recruiting violations; especially when they offer improper incentives. Informers or others who provide information about recruiting violations obviously have some first-hand knowledge of recruiting violations. Often these individuals initiate the investigative process.

Some of the information collected by the NCAA contains intimate, personal or financial information about these individuals. Their limited disclosural privacy right does not outweigh the public's legitimate interest in the information sought by Plaintiff's and Intervenor's. The public has a legitimate interest in knowing who recruits illegally, how these unscrupulous individuals operate, which institutions tolerate or encourage such activity, and what, if any, sanctions are imposed upon these individuals or institutions when discovered. Further, student-athletes and recruits, as well as their parents, have a legitimate interest, if not a great need, for this information. They should be aware of the tactics and techniques of over-zealous alumni, boosters, and coaches. They need to know what type of inducements are illegal, and they need to be aware of the sanctions imposed upon violations. Further, alumni and boosters of all institutions have a legitimate interest in knowing the circumstances of violations as well as the identity of violators. Such public knowledge will facilitate compliance with recruiting rules and discourage similar

violations. The limited disclosural privacy rights of the individuals named in the information sought by Plaintiffs and Intervenors are pale in the face of these legitimate public interests. These important interests require disclosure of the information in issue with the exception of the information noted earlier.

3) State Common Law Privacy

Both Defendants assert that the information at issue is excepted from disclosure under section 3(a)(1) of the Act because it is protected by Texas common law. Specifically, the Defendants allege that the "private and embarrassing facts" concept as well as the "false light" privacy concept bar disclosure of the information at issue.

The Texas Supreme Court addressed these concepts in *Industrial Foundation of the South v. Texas Industrial Accident Board*, 540 S.W.2d 668, 682 (Tex. 1976) (citing *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973)). The Court established a two-prong test to determine whether otherwise public information could be deemed confidential under state common law. First, the information must contain "highly intimate or embarrassing facts about a person's private affairs such that its publication would be highly objectionable to a person of ordinary sensibilities." *Id.* at 685. Second, the information must not be of legitimate concern to the public. *Id.* Both requirements must be met before the information will be protected. *Id.*; TEX. ATT'Y GEN. ORD-423 (1984); ORD-400 (1983); see *Calvert v. Employees Retirement System of Texas*, 648 S.W.2d 418 (Tex. App.—Austin 1983, writ ref'd n.r.e.). The Court noted that once the first prong was established, the burden would fall upon the requestor to establish a legitimate public concern. *Id.* In this case, however, Defendants did not request an attorney general's opinion pursuant to section 7(a). Therefore, this burden shifts to Defendants. TEX. REV. CIV. STAT. ANN. art. 6251-17(a), § 7a (Vernon

Supp. 1986); *Houston Chronicle Publishing Co.*, 673 S.W.2d at 324.

The Court has already determined that the public has a legitimate interest in the information sought; consequently, the second prong of the test has not been met, and Texas common law will not prevent disclosure of the information in issue. While a person of ordinary sensibilities might well be embarrassed by a revelation that they engaged in some sort of recruiting prohibited by the Defendants, his or her embarrassment cannot prevent disclosure of information in which the public has a legitimate public interest.

Both Defendants argue that ORD-142 requires that the information sought be protected. TEX. ATT'Y GEN. ORD-142 (1976). The Court is not convinced that ORD-142 mandates the result sought by Defendants. The requestor in ORD-142 sought disclosure of SWC minutes. He asserted that the public had an interest in understanding the rationale behind certain actions of SWC representatives from public universities. The Attorney General noted that the SWC minutes contained no details of allegations or investigations and thus could not explain the reasons for the actions taken. The opinion noted that the individuals reprimanded had a privacy interest in their name and the fact of the reprimand. The Attorney General concluded that the requestor failed to show a public interest in the minutes.

In this case, Plaintiffs and Intervenor have demonstrated a legitimate public interest in the information sought. Moreover, the Attorney General has since determined that an individual's name, the fact that he is disciplined, the punishment assessed and the facts which led to the discipline are not private under section 3(a)(2) of the Act. TEX. ATT'Y GEN. ORD-315 (1982). While this exception is not involved in this case, the privacy standard or analysis involved is the same as that employed for a

section 3(a)(1) analysis. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.). The Court is of the opinion that the second prong of the *Industrial Accident Board* test has not been satisfied; therefore, that aspect of state common law privacy will not bar disclosure of the information in issue.

The “false light” privacy concept was recognized in *Industrial Accident Board*, 540 S.W.2d at 682, and applied by the Attorney General in ORD-308. TEX. ATT’Y GEN. ORD-308 (1982). There, the Attorney General held that portions of an investigative report would place an individual under investigation in a false light. Those portions were presumed false because:

- 1) the information [was] communicated to a public body by an anonymous source; 2) the agency made a determination that the information [was] not in fact true; and 3) the public interest in disclosure was minimal.

Id. The Attorney General subsequently held:

A governmental body may withhold information on the basis of false light privacy only if it finds, based upon the weight of the evidence *demonstrable* to this office, that there are serious doubts about the truth of the information. In addition, the information must be highly offensive to a reasonable person and the public interest in disclosure must be minimal.

TEX. ATT’Y GEN. ORD-372 (1983) (emphasis added). “This is not a balancing test; the information must satisfy *both* of these tests [highly offensive and of minimal public interest] to be held non-disclosable.” *Id.* ORD-400 (1983).

The Court has already determined that the public has a legitimate interest in the information at issue. Further, a majority of the information communicated to the

defendants did not come from an anonymous source. The information which did come from an anonymous source is not specifically identified by Defendants. Moreover, the Defendants have failed to point out the demonstrable evidence which establishes serious doubt about the truth of any particular piece of information. The Act requires that the governmental body "determine which specific exception applies to particular information. Open Records Decision No. 150 (1977). A general claim that an exception applies to an entire report, when that exception is clearly not applicable to all of the information in the report, does not comport with the procedural requirements of the Act." *Id.* ORD-419 (1984). Both the Act and this Court's May 15, 1986 Order require that Defendants specify the exemption claimed for each piece of information. Specificity is lacking with regard to this claimed exemption. The Court is of the opinion that the "false light" privacy concept will not bar disclosure of the information at issue.

Both Defendants claim that the common law informer's privilege bars disclosure of the information sought.

The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.

Rovarios v. United States, 353 U.S. 53, 59 (1957). The privilege has been extended to those who provide information to "administrative officials having a duty of inspection or law enforcement within their particular spheres." *E.g.*, TEX. ATT'Y GEN. ORD-285 (1981) (police department investigation); ORD-279 (1981) (zoning ordinance enforcement with criminal penalties); ORD-230 (1979) (school district investigation of alleged employee criminal

conduct). The privilege has been extended only to agencies which exercise some police power. Neither Defendant has a duty of inspection nor a duty of law enforcement. In short, they are not authorized to exercise any form of police power. Therefore, the informer's privilege will not bar disclosure of the information at issue.

4) Freedom of Association

The NCAA argues that any disclosure mandated by the Act "would violate the member school's and student's constitutional right of freedom of association." The NCAA cites *NAACP v. Alabama*, 357 U.S. 449 (1958) in support of its argument that disclosure will infringe upon its member school's right to "engage in association for the advancement of beliefs and ideas." *Id.* at 460.

The Court previously rejected the NCAA's claim that the association was protected by the first amendment guarantee of freedom of association. *Kneeland, et al v. NCAA, et al*, No. A-85-CA-616, slip op. at 13 (W.D. Tex. Aug. 18, 1986). The Court will assume that the NCAA has standing to assert the associational rights of its members. See *NAACP v. Alabama*, 357 U.S. 449, 458-59 (1958); *Industrial Foundation*, 540 S.W.2d at 678. The first amendment protects the individual's right to speak freely, advocate ideas, associate with others, and petition the government for redress of grievances. *Smith v. Arkansas State Highway Employers, Local 1315, et al*, 441 U.S. 463, 464 (1979). The government cannot impede an association's right to advocacy on behalf of its members by general prohibition or by imposition of sanction for expression of a particular view that it opposes. *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *NAACP v. Batton*, 371 U.S. 415 (1963). Further, the government cannot require disclosure of membership in an association in an attempt to restrain freedom of association. *NAACP v. Alabama*, 357 U.S. 449, 462 (1958); *Plante v. Gonzales*, 575 F.2d 1119, 1132 (5th Cir. 1978).

Disclosure of the information in issue will not prohibit the NCAA's members from joining together, "or persuading others to do so, or from advocating any particular ideas." *Smith*, 441 U.S. 465. There are no allegations in this case that disclosure under the Act will result in retaliation or discrimination proscribed by the first amendment. The general public is well aware of the NCAA's role in college sports, the nature of the NCAA's membership, and the fact that prospective student-athletes and student athletes may be improperly recruited. Despite these known facts, the NCAA's membership has not waned. It cannot be seriously argued that disclosure of specific details of recruiting violations will adversely affect NCAA membership. This conclusion is supported by the fact that the NCAA currently maintains almost exclusive control over college sports. Any institution that desires to maintain a significant program in major sports must adhere to NCAA rules. "[M]embership in the NCAA is a prerequisite for institutions wishing to sponsor a major, well-rounded athletic program. *Board of Regents v. NCAA*, 546 F. Supp. 1276, 1288 (D.C. Okla. 1982), *aff'd*, — U.S. —, 104 S. Ct. 2948 (1984); Weistant, *Legal Accountability and the NCAA*, 10 J.C. & UNIV. LAW 167, 171-72 (1983).

The NCAA has failed to demonstrate that disclosure required by the Act is motivated by a retaliatory or discriminatory intent or has any retaliatory or discriminatory effect. The member's first amendment right to freedom of association will be abridged by disclosure of the information in issue.

5) Attorney-Client Privilege

The NCAA asserts that some documents are protected from disclosure by the attorney-client privilege. Confidential communications between attorney and client for the purpose of obtaining legal advice are protected by this privilege. *Fisher v. United States*, 425 U.S. 391, 403 (1976); *Hodges, Grant & Kaufmann v. United States Government*,

768 F.2d 719, 720-21 (5th Cir. 1985). The burden of demonstrating the applicability of the privilege rests upon the NCAA. 768 F.2d at 721. If the NCAA establishes applicability of the privilege, it will have established a compelling demonstration that the information should not be disclosed and met the presumption of section 7(a).

The Court has reviewed the documents that are claimed to be exempt under the attorney-client privilege and is of the opinion that the information contained therein was communicated between attorney and client for the purpose of obtaining legal advice. NCAA document numbers 863, 865, 874, 875, 876 and 1815A fall under the privilege and shall not be disclosed.

6) Exception for Self-Critical Analysis

The NCAA alleges that the documents submitted for *in-camera* review were generated as the result of their member institutions' cooperation and participation in various NCAA investigations. Much of the information sought is the product of the member institutions' internal investigation of allegations posed by the NCAA. Consequently, the NCAA argues that the requested information is protected by a privilege of self-critical analysis. The Court previously ruled that the NCAA could not assert the privilege. *Kneeland, et al v. NCAA, et al*, A-85-CA-616, slip op. at 26-27 (W.D. Tex. Aug. 18, 1986). Intervenor A. H. Belo Corp. argues further that the NCAA has no standing to assert the privilege, if any, for its member institutions. The Court will assume the NCAA's standing to assert this privilege, if any, on behalf of its member institutions. See *Industrial Foundation*, 540 S.W.2d at 668.

As noted in the Court's prior opinion, the privilege of self-critical analysis protects against disclosure of information generated by internal investigations. *Kneeland*, slip op. at 27. Three criteria must be met before the privilege is effective:

1. the information must result from a critical self-analysis undertaken by the party seeking information;
2. the public must have a strong interest in preserving the free flow of the type of information sought; and
3. the information must be of the type whose flow would be curtailed if discovery were allowed.

Note, *The Privilege of Self-Critical Analysis*, 96 HARV. L. REV. 1083, 1086 (1983); e.g., *Bredice v. Doctors Hospital, Inc.*, 50 F.R.D. 249, 250-251 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973).

The Court has found no authority in this Circuit which recognizes the privilege of self-critical analysis. Even if the Court assumes the viability of the privilege, the NCAA cannot establish the second criteria set out above. The public may have an interest in preserving the free flow of the information sought, but even more compelling is the public overriding interest in disclosure of the information for the reasons previously outlined. Further, any harm incurred because of disclosure occurred when the member institution disclosed the results of its internal investigation to the NCAA. The purpose of the privilege is to encourage frank internal review. Once the results of an investigation are presented to the NCAA that purpose is vitiated. The privilege of self-critical analysis will not bar disclosure of the information sought by Plaintiffs and Intervenors.

B) Section 3(a)(8); Law Enforcement Records

Defendant SWC asserts that the information in issue is exempt as law enforcement records. This exception has generally been restricted to records of governmental agencies that investigate and enforce criminal laws. See e.g., *Heard v. Houston Post Co.*, 684 S.W.2d 210, 212-13 (Tex.

App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Houston Chronicle Publishing Co.*, 673 S.W.2d at 320-21; TEX. ATT'Y GEN. ORD-438 (1986); ORD-434 (1986); ORD-372 (1983). The SWC is not a law enforcement agency. It is not charged with the investigation or enforcement of criminal laws. The only rules it enforces are promulgated by its members. Even if this Court extended this exception to the SWC, it applies only "if the release of information would 'unduly interfere' with law enforcement or prosecution." TEX. ATT'Y GEN. ORD-438 (1986)." When the "law enforcement" exception is claimed as a basis for excluding information from the public view, the agency claiming it must reasonably explain, if the information does not supply the explanation on its face, how and why release would unduly interfere with law enforcement." ORD-434. Defendant SWC has not demonstrated that prosecution based upon any piece of information it holds is anticipated. Further, Defendant SWC has submitted no evidence which demonstrates that release of any information would unduly interfere with enforcement of criminal laws. Section 3(a)(8), therefore, is inapplicable. ORD-438 (1986).

C) Section 3(a)(11); Inter-Agency or Intra-Agency Memoranda

Both Defendants claim that virtually every document produced for *in-camera* inspection is an inter-agency or intra-agency memoranda excepted from disclosure by section 3(a)(11). Section 3(a)(11) is designed to protect from disclosure "advice and opinions on policy matters and to encourage open and frank discussion between subordinate and chief concerning administrative action. Attorney General Opinion H-436 (1974); Open Records Decision Nos. 179 (1977); 168 (1977), 163 (1977), 149 (1976), 137 (1976), 128 (1976), 86 (1975), 81 (1975), 29 (1974) and 20 (1974)." TEX. ATT'Y GEN. ORD-196 (1978); *e.g.*, *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.); TEX. ATT'Y GEN. ORD-429 (1985); ORD-392 (1983); ORD-308 (1982). When advice,

opinions and recommendations appear in the same document with objective factual dates, the factual information should be severed and disclosed. OP. TEX. ATT'Y GEN. NO. H-436 (1974); *e.g.*, ORD-435 (1986); ORD-429 (1985). If the factual information cannot be reasonably severed from advice, opinion or recommendations, the information will not be disclosed. *See id.* ORD-429 (1985). If the agency adopts or incorporates by reference a memorandum in explaining the basis of a decision, the exception is waived and the information must be made public. TEX. ATT'Y GEN. ORD-137 (1976) (*citing NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132 (1975)). In determining what constitutes an opinion, it is important to note the distinction between evaluation and recommendation. ORD-213 (1978). Only recommendations will be excepted.

The vast majority of the documents submitted for *in-camera* inspection contain objective factual information. In fact, most of the documents contain only objective factual information. The NCAA has not attempted to assist the Court in separating advice, opinion and recommendation from objective fact. Rather, it claims that entire documents, a significant number of which consist of hundreds of pages, are excepted by this section. The SWC is generally more specific and claims that certain paragraphs should be exempted. Because the presumption of section 7(a) is in effect, Defendants must establish a compelling demonstration that the information in issue should not be released.

Defendants have met this burden only to the extent that the Court has applied the privacy exceptions under section 3(a)(1). In all other respects the Court has found no compelling demonstration that the information claimed to be exempted under section 3(a)(11) should be excepted from disclosure. Accordingly, the Court is of the opinion that section 3(a)(11) will not bar disclosure of the information in issue.

D) Sections 3(a)(14) and 14(e); Student Records

Both Defendants allege that "almost *all*" of the information in issue consists of student records and therefore cannot be disclosed under sections 3(a)(14) and 14(e) of the Act. Section 3(a)(14) excepts from disclosure "student records at educational institutions funded wholly, or in part, by state revenue; . . ." TEX. REV. CIV. STAT. ANN. art. 6252-17a, § 3(a)(14) (Vernon Supp. 1986). Section 14(e) states: "Nothing in this Act shall be construed to require the release of information contained in education records of any educational agency or institution except in conformity with the provisions of the Family Educational Rights and Privacy Act [the Buckley Amendment]. . . ." *Id.*, § 14(e). The Act does not define "educational institution or agency" or "student records." Moreover, the Buckley Amendment clearly states that an education "agency or institution [is] any public or private agency which is the recipient of funds under any applicable program." 20 U.S.C. § 1232g(a)(1)(C)(3) (1982). Further, the Buckley Amendment defines education records as "those records which : 1) are directly related to a student, and 2) are maintained by an educational agency or institution or by a party action for the agency or institution." *Id.*, § 1232g. "[T]he prohibitions of the Amendment cannot be deemed to extend to information which is derived from a source independent of school records." *Frasca v. Andrews*, 463 F. Supp. 1043, 1050 (S.D.N.Y. 1979). If the Defendants are educational agencies or institutions under either provision of the Act, the information in issue may be disclosed only in accordance with the Buckley Amendment and the Act.

There is no evidence that either Defendant is an educational agency or institution under the Buckley Amendment. Nothing in the record indicates that they receive any federal funds. Moreover, the only Court to address the issue specifically held that an intercollegiate athletic conference was not an educational agency or institution

as defined by the Act, and that records held by them were not education records. *Arkansas Gazette Co. v. Southern State College, et al*, 620 S.W.2d 258, 259 (Ark. 1981), *appeal dismissed and cert. denied*, 455 U.S. 931 (1982). The Defendants do not fit the definition of educational agency or institution under the Buckley Amendment. Moreover, the Court is not convinced that the information in issue is "maintained by [Defendants] acting for the agency or institution," i.e., their member universities. The record reflects that the information maintained by the Defendants is not necessarily provided by their member universities; it is often not available to member universities, and, as this case demonstrates, it is often used *against* the member universities. It can hardly be argued that the information is held *for* the member universities. *Contra* TEX. ATT'Y GEN. ORD-142 (1976) (SWC Records held to be education records). The Defendants are not education agencies or institutions under the Buckley Amendment.

The Defendants are "educational institutions" under section 3(a)(14) if, among other things, "education is the primary function of the institution." TEX. ATT'Y GEN. ORD-427 (1985) (*citing LaManna v. Electrical Workers Local Union No. 474*, 518 S.W.2d 348 (Tenn. 1974); ORD-142 (1976)).

"One of the NCAA's avowed purposes is to maintain 'intercollegiate athletics as an integral part of the education program.' " NCAA Brief on Exceptions at 28 (*citing Justice v. National Collegiate Athletic Ass'n*, 577 F. Supp. 356, 361 (D. Ariz. 1983) (emphasis added)). Defendant SWC would not dispute application of this premise to it. Defendants are basically non-profit service organizations which facilitate athletic competition between their member institutions. The educational benefits afforded students by the Defendants, if any, are collateral. Despite the NCAA's insistence that "it cannot be seriously controverted that the NCAA is an 'educational institution,'" the court cannot find that its primary function is education.

Even if the Court did find that Defendants were educational institutions, application of sections 3(a)(14) and 14(e) would not bar disclosure of the information in issue. The Court has previously ruled that the names of all students and all other facts be redacted from the information ordered disclosed. In ORD-165, the Attorney General considered whether a school district would disclose student discipline records. The issue was whether the information was "personally identifiable as to particular students so as to bring it within the restrictions of the Buckley Amendment." *Id.* The opinion noted that personally identifiable meant:

- (a) the name of a student, the student's parent or other family member, (b) the address of the student, (c) a personal identifier, such as the student's social security number or student number, (d) a list of personal characteristics which would make the student's identity easily traceable, or (e) other information which would make the student's identity easily traceable.

Id. Obviously, this information included that which would make the student's identity easily traceable. The Attorney General concluded that a workable compromise between individual privacy rights of students and the public's right to information about government agencies could be achieved by deletion of the personally identifying information. *Id.* (citing *Department of the Air Force v. Rose*, 425 U.S. 352 (1976)). The opinion notes that sections 14(e) does not require absolute certainty that a student's identity would never be discussed. *Id.*

This Court is of the opinion that the deletion of personally identifiable information as previously Ordered will adequately protect the privacy interests of the students identified in the information sought by Plaintiffs and Intervenor.

IV. CONCLUSION

The Court is of the opinion that deletion of the names of students, student-athletes, prospective student athletes and their family members, as well as all transcripts, phone numbers, bank account numbers, social security numbers, and geographical and biographical information about these individuals is required by section 3(a)(1) of the Act. Such information includes the name and location of a student's high school or its equivalent. Further, the Court finds that the attorney-client privilege excepts from disclosure NCAA document numbers 863, 865, 874, 875, 876 and 1815A. Those SWC documents which pertain to ongoing investigations, as designated by the SWC, shall not be disclosed.

The Court is of the opinion that sections 3(a)(8), 3(a)(11), 3(a)(14) and 14(e) will not bar disclosure of the remaining information in issue.

ACCORDINGLY, IT IS HEREBY ORDERED, ADJUDGED and DECREED that Plaintiffs' and Intervenor's applications for writ of mandamus are hereby GRANTED IN PART.

IT IS FURTHER ORDERED that Defendants redact from the information submitted for *in-camera* inspection all information described above and make the redacted information requested available to Plaintiffs and Intervenor within sixty (60) days of the date of this Order.

The Clerk of this Court is hereby ORDERED to file all information submitted to this Court for *in-camera* inspection as part of the record in these proceedings. The information shall remain under SEAL until further Order of this Court.

The Court would note that some of the documents Ordered released contain personal or sensitive information; consequently, the Court has some concern about their fair and legitimate use. The content of some of the very documents sought by Plaintiffs and Intervenor demonstrates

an irresponsible, incomplete, and haphazard approach taken by the media in reporting college athletic events and recruitment. The Court cannot, and will not, attempt to control the media's use of public information. The Court will, however, encourage *studied and responsible* use of such information. The rights and privileges guaranteed by the Constitution and laws of this country must be exercised responsibly if those rights are to endure.

SIGNED and ENTERED this 4th day of November, 1986.

/s/ JAMES R. NOWLIN
JAMES R. NOWLIN
UNITED STATES DISTRICT JUDGE

